Supreme Court, U.S.
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No. 94-_____

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IN THE

**SUPREME COURT OF THE UNITED STATES**

SEPTEMBER TERM, 1994

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KEN NASH

*Petitioner*

vs.

HALLIBURTON CO., AND
COMMISSIONER OF THE INTERNAL
REVENUE SERVICE

*Respondents*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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# PETITION FOR WRIT OF CERTIORARI

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*Pro Se*

173 pp

## QUESTION PRESENTED

1. Whether the U.S. Tax Court may impose its own interpretation on a vague Statute, and ignore the landmark U.S. Supreme Court decision of *Chevron*[1], which holds that where a Statute is silent or ambiguous with respect to a specific issue, the construction of the agency responsible for interpreting that statute should be upheld if it is a reasonable interpretation?

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[1] *Chevron U.S.A. Inc, v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed. 2d 694 (1984)

## PARTIES TO THE PROCEEDINGS

All parties to the proceeding in the Court of Appeals are identified in the caption. The alignment of the parties is Commissioner of the Internal Revenue Service and Ken Nash vs. Halliburton.

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No. 94-_____

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SEPTEMBER TERM, 1994

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KEN NASH

*Petitioner*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**PETITION FOR WRIT OF CERTIORARI**

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Petitioner, Kenneth L. Nash, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit wherein the Court refuses to apply the rule of the United States Supreme Court's decision of

*Chevron* to determine whether the U.S. Tax Court may impose its own interpretation on a vague Statute, which interpretation contradicts the administrative interpretation of the Statute made by the Commissioner for the Internal Revenue Service.

## OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in Appendix A to this Petition. The opinion of the U.S. Tax Court is reported at 100 T.C. No. 15 and appears in Appendix C. The unpublished determination of the IRS District Director is set forth in Appendix D. The unpublished opinion of the IRS Appeals Division is set for in Appendix E.

## JURISDICTION

The Court of Appeals' Opinion to be reviewed was filed May 31, 1994 and is set forth in Appendix A. A timely Petition for rehearing was filed on June 11, 1994. The Court of Appeals' denial of the Petition for Rehearing was issued on June

28, 1994 and is set forth in Appendix B. This Court's jurisdiction is invoked under Title 28 U.S.C. §1254(1).

## STATUTE AND REGULATION

**26 U.S.C. §411(d)(3), 26. U.S.C. §7476(b)(3),** and **Treasury Regulation §1.411(d)-2(b)(1)** are set forth in Appendix F.

## STATEMENT OF THE CASE

In 1987, Halliburton Co. requested the IRS to find that there was no partial termination of the Halliburton Pension plan (the "plan") due to the 37% reduction in plan participation in 1986.

The relevant statute, 26 I.R.C. §411(d)(3), does not define "partial termination". Moreover, the relevant treasury regulation merely states that the occurrence of a partial termination is determined by consideration of "all facts and circumstances".

The vesting period in the plan in 1986 was 15 years. An employee with 10 years at Halliburton in 1986 would be 50%

vested and 50% unvested in the plan.

If a partial termination occurred, then the unvested portion of the pensions of employees who left the plan in 1986 becomes fully vested. If no partial termination occurred, then the unvested portion of the pensions of employees who left the plan in 1986 reverts to employees who remained in the plan at the end of 1986.

The Internal Revenue Service made an initial finding, set forth in Appendix D, that a partial termination occurred. Halliburton appealed this finding within the Administrative process. Upon appeal within the Administrative process, the IRS again determined that a partial termination had occurred as set forth in Appendix E.

Halliburton petitioned the U.S. Tax Court to overturn the IRS decision under 26 U.S.C. §7476 (See Appendix F). When Halliburton petitioned to the Tax Court, Appellant also petitioned the Tax Court under the same statute to affirm the IRS administrative decision.

The Tax Court reversed the IRS decision. The Tax Court flatly refused to

apply the IRS interpretation of the statute and regulation on issues about which the Statute and Regulations, set forth in Appendix F, are completely silent.

The Tax Court stated that no deference is owed to the IRS by the U.S. Tax Court, apparently under any circumstances, citing as authority the case of *Stubbs, Overbeck & Associates v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971). (see Appendix C p. C49,50 - 100 T.C. No. 15) Appellant submitted that *Stubbs* is completely irrelevant to *Chevron* because *Stubbs* does not pertain to a vague statute. In *Stubbs,* the question at issue is well defined in the statute.

The Fifth Circuit Court of Appeals' Written Opinion (Appendix A) is silent on the issue of *Chevron* presented in this petition for writ. However, during oral argument, the Court of Appeals proposed that the rule of *Chevron* does not apply to the U.S. Tax Court. According to the Court, the U.S. Tax Court, being established by Congress, is the agency responsible for administering the statute. Therefore, *Chevron* is not applicable.

However, the U.S. Tax Court is not designated by Congress to administer the tax statutes. The Tax Court was originally established essentially as a convenience so that a judicial decision could be obtained before paying any taxes. *Martin v. C.I.R.*, 358 F.2d 63, certiorari denied 87 S.Ct. 231.

In the request for rehearing, Appellant pointed out U.S. Tax Court jurisdictional requirements for a declaratory judgment under 26 U.S.C. §7476(b)(3) as set forth in Appendix F,

> "The Tax Court shall not issue a declaratory judgment ... unless it determines the petitioner has exhausted administrative remedies...".

If for no other reason, the Tax Court is not the agency that administers the partial termination statute because the Tax Court does not even have jurisdiction until the administrative remedies are exhausted.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: (1) the issue affects large numbers of persons throughout the United States. In this case alone, thousands of persons and over $50 million dollars are involved; (2) the holding produces a split between the Fifth Circuit and the Second Circuit Court of Appeals concerning the rule of *Chevron* with respect to 26 U.S.C. §411(d)(3) and; (3) the Fifth Circuit refuses to follow the rule of the seminole U.S. Supreme Court decision of *Chevron* with respect to 26 U.S.C. §411(d)(3).

## ERROR OF LAW

Instead of imposing its own construction on the Statute, the Tax Court should have determined:

> "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously

expressed intent of Congress. If, however, the Court determines that Congress has not directly addressed the precise question at issue, the Court does not simply impose its own construction on the Statute, as would be necessary in the absence of an administrative interpretation. Rather, if the Statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the Statute". *Chevron U.S.A. Inc. v Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed. 2d 694 (1984); *accord Mead Corp. v Tilley*, 490 U.S. 714, 722, 109 S.Ct. 2156, 2161-62, 104 L.Ed.2d 796 (1989). Moreover, "to uphold [the agency's interpretation], we need not find that [its] construction is the only reasonable one, or that it is the result we would have reached had the question arisen in the first instance in judicial proceedings....We need only conclude

that it is a reasonable interpretation of the relevant provisions." *Aluminum Co. of Am. v Central Lincoln People's Util. Dist.*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479, 81 L.Ed. 2d 301 (1984) (emphasis in the original)(quoting *American Paper Inst., Inc. v American Elec. Power Serv. Corp.*, 461 U.S. 402,422-23, 103 S.Ct. 1921, 1932-33, 76 L.Ed. 2d 22 (1983) (quoting *Unemployment Compensation Comm's v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245,250, 91 L.Ed. 136 (1946))); see *Chevron*, 467 U.S. at 843 n. 11, 104 S.Ct. at 2782 n. 11; see also *Blum v Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982) (interpretation of agency that administers statute is entitled to substantial deference). From *Weil v Retirement Plan Administrative Committee*, 933 F.2d 106 (2nd Cir. 1991):

Pursuing this analysis with respect to the partial termination statute, 26 I.R.C. 411(d)(3), in *Weil v Retirement Plan Administrative Committee*, 933 F.2d

106 (2nd Cir. 1991), the Second Circuit of Appeals proceeded as follows:

> "Based upon the conflicting interpretations by our sister circuit and upon our own reassessment as well, it appears to us that the legislative purpose behind §411(d)(3) is far from clear. See *Vornado, Inc. v Trustees of the Retail Store Employee's Union Local 1262*, 829 F.2d 416, 418 n.2 (3rd Cir. 1987) ('the purpose underlying §411(d)(3) is not altogether obvious'); *Bruch v Firestone Tire & Rubber Co.*, 828 F.2d 134, 151 (3rd Cir.1987) aff'd in part and rev'd in part on other grounds, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed. 2d 80 (1989) ('It is not easy to divine the purpose of §411(d)(3). Without a clear sense of the provision's purpose it is difficult to decide what should and should not constitute a partial termination. Clarification from Congress or the Internal Revenue Service as to the purpose of this provision would make it substantially easier to enforce'). Finally, we recognize that the

statute itself is entirely silent regarding how a partial termination is to be measured....."

"Having concluded that the congressional purpose behind the partial termination statute is unclear and that the statute is silent regarding the measurement of a partial termination, we next consider whether the IRS's position is based on a permissible construction of §411(d)(3). In our view, the IRS' interpretation of §411(d)(3) - that a partial termination occurs when there is a significant contraction of the plan, and therefore, all terminated plan participants must be considered in a partial termination inquiry-is a reasonable construction in light of the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizable reduction in benefits under the plan"). Those examples suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole. Moreover, the language used

> in the treasury regulations, which refers to the exclusion of employees who have been covered by a plan, additionally supports the IRS's position. We also find significance in the fact that no distinction was made between vested and non-vested plan participants in these sources. We therefore apply the ratio utilized by the IRS and, as the district court found, conclude that the Plan was partially terminated in 1981 when 33.4% of the Plan participants were discharged."

The Fifth Circuit decision in the present case conflicts with the decision of the Second Circuit, quoted from above.

In both cases, there is an issue of whether the Commissioner's interpretation of Statute controls as to which terminated employees must be considered in a partial termination inquiry.

See, for instance, pages C89-101 in Appendix C where the Tax Court interprets the Statute to find that "rehirees" should

not be considered in the partial termination inquiry. On the other hand, the Commissioner interpreted the Statute to find that "rehirees" must be considered.

The Commissioner's interpretation of "temporary" as applied to "rehirees" was rejected by the Tax Court. (See page C96). It should be noted that the result of the Tax Court's interpretation is that a substantial number of "rehirees" who have permanently lost pension benefits, as a result of the alleged partial termination, will not be considered in the partial termination inquiry.

Because the Second Circuit Court of Appeals resolved the problem by applying the holding of *Chevron*, and the Fifth Circuit Court of Appeals refused to do so, a split between the circuits is produced.

This Court should take the opportunity to eliminate the chaos in the present state of partial termination law that affects employees and businesses across the nation and wherein each court, including the Tax Court, presently imposes

its own construction on the manifestly ambiguous partial termination statute.

The Commissioner's interpretation of the vague partial termination statute should be upheld if it is a reasonable interpretation of statute.

This Court should grant certiorari here to explicitly rule that the U.S. Tax Court, as well as all other trial courts, are subject to the landmark holding of *Chevron*.

**CONCLUSION**

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion in the Court of Appeals in this matter.

If this Court elects not to address the issues presented in this writ at the present time, Appellant requests that the writ issue and the matter be remanded to the Court of Appeals for a redetermination in the light of this Court's opinion in *Chevron*.

Respectfully submitted,

Kenneth L. Nash

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**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**NO. 93-4978**

---

HALLIBURTON COMPANY, By Ken Nash,

Petitioner,

Employee, KEN NASH

Petitioner-Appellant,
Cross-Appellant,

VERSUS

COMMISSIONER OF INTERNAL REVENUE SERVICE

Respondent-Appellee,
Cross-Appellant,

CONSOLIDATED WITH

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NO. 93-4996

---

HALLIBURTON COMPANY

Petitioner-Appellee,

VERSUS

COMMISSIONER OF INTERNAL REVENUE SERVICE

Respondent-Appellant

FILED: May 31, 1994

Before JOHNSON, BARKSDALE, AND DeMOSS, Circuit Judges

PER CURIAM[1]:

On April 27, 1987, Halliburton Company submitted an application to the Internal Revenue Service, requesting a determination of whether a partial termination of the Halliburton Profit Sharing and Savings Plan had occurred during the plan year ending on December 31, 1986. Ken Nash, a former employee of Halliburton, submitted a comment letter to the IRS with respect to Halliburtons's requested determination. Thereafter, the

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Commissioner issued a proposed determination finding that a partial termination had occurred and, thus, that the plan was not "qualified" under Section 401 (a) of the Internal Revenue Code (26 U.S.C.) during 1986 plan year.

Halliburton subsequently petitioned the United States Tax Court for a declaratory judgment that a partial termination had not occurred and that the plan remained qualified. Nash subsequently filed a separate petition with the Tax Court, seeking a declaratory judgment that a partial termination had occurred and, thus, that he was entitled to the unvested portion of his pension benefits. See U.S.C. § 411(d)(3). On March 31, 1993, the Tax Court entered a decision declaring that no partial termination had occurred.

The Commissioner and Nash have

appealed the Tax Court's decision, principally arguing that the court applied the wrong standard in determining that a partial termination did not occur. Having reviewed the Tax Court's thorough, 56-page opinion, we conclude that the court applied the correct legal standard.

As to Nash's other complaints and other issues raised in the Commissioner's brief, we are convinced, after having reviewed the briefs, record, and relevant law, that the Tax Court's decision is correct and that it should in all respects be AFFIRMED.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**NO. 93-4978**

---

HALLIBURTON COMPANY, By Ken Nash,

Petitioner,

Employee, KEN NASH

Petitioner-Appellant,
Cross-Appellant,

VERSUS

COMMISSIONER OF INTERNAL REVENUE SERVICE

Respondent-Appellee,
Cross-Appellant,

CONSOLIDATED WITH

---

NO. 93-4996

---

HALLIBURTON COMPANY

Petitioner-Appellee,

VERSUS

COMMISSIONER OF INTERNAL REVENUE SERVICE

Respondent-Appellant

---

Appeal from the United States Tax Court

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JUN 28 1994

**ON PETITION FOR REHEARING**

Before JOHNSON, BARKSDALE and DeMOSS, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

*/s/ HAROLD R. DEMOSS, JR.*
United States Circuit Judge

100 T.C. No. 15

UNITED STATES TAX COURT

HALLIBURTON COMPANY, Petitioner v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

HALLIBURTON COMPANY, by KEN NASH, EMPLOYEE, Petitioner v.

COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket Nos. 26290-90R, 2397-91R. Filed March 24, 1993.

In the instant declaratory judgment action under sec. 7476, I.R.C., H seeks review of R's proposed determination that a profit sharing plan sponsored by H experienced a partial termination during 1986. A sharp decline in H's business during such year caused H to initiate net layoffs of 3,891 participants in the plan, reducing participation in the plan by 19.85 percent. Held: Such discharges did not cause a partial termination of the

plan under sec. 411(d)(3), I.R.C., when the discharges are considered in light of all facts and circumstances.

Donald f. Wood, Douglas E. Hamel, and Miriam M. Burke, for petitioner in docket No. 26290-90R.**

Ken Nash, pro se in docket No. 2397-91R.

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** R.Hardin Matthews, James R. Brown, Jr., John M. Harrington, Jr., and Jeffrey P. Trout filed a brief amicus curiae on behalf of the Profit Sharing Committee of the Halliburton Profit Sharing and Savings Plan.

Thomas W. Oliver filed a brief amicus curiae on behalf of the Halliburton Employee's Legal Protection Committee.

John J. Osterhage filed a brief amicus curiae on behalf of certain former and present participants in the Halliburton Profit Sharing and Savings Plan.

James W. Lessis, for respondent.***

OPINION

WELLS, Judge: The instant case is before us on a petition for declaratory judgement under section 7476. The issue presented for decision is whether a profit sharing plan sponsored by Halliburton Co. (Halliburton) experienced a partial termination under section 411(d)(3) for the plan year ending on December 31, 1986.

Unless otherwise indicated, all section references are to be to the Tax Court Rules of Practice and Procedure.

Background

The instant case was submitted for declaratory judgment on a stipulated

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*** Janine H. Bosley and Patricia Scot-Clayton, on behalf of respondent, filed a response to the brief amicus curiae of the Profit Sharing Committee.

administrative record pursuant to Rule 217.

Halliburton is a corporation with its principal place of business in Dallas, Texas. Ken Nash (Mr. Nash) resided in Houston, Texas, at the time he filed his petition. The plans whose qualified status is in issue are the Halliburton Profit Sharing and Savings Plan (the Halliburton Plan or Plan) and the IMCO Profit Sharing and Savings Plan (the IMCO Plan).

The Halliburton Plan was established in 1944 and is a defined contribution profit sharing plan. The Plan received favorable determination letters with respect to all amendments through January 16, 1986. From 1944 through 1985, Halliburton contributed approximately 10 percent of annual profits to the Plan, totaling $575 million, and the Plan has

paid out over $600 million in benefits. No contribution was made in 1986 because Halliburton had no profits in such year.

Eligible plan participants employed by Halliburton on the last day of the year, or who terminated participation during the year due to retirement, death, or disability, were entitled to a share of Halliburton's annual contribution to the Plan. Such contribution was allocated to each participant's account based on the ratio of such participant's basic earnings to the total basic earnings for all participants. Employer contributions were subject to a 5-to-15-year graded vesting schedule, as permitted by section 411(a) for 1986;[1] account balances vested upon

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[1] In the Tax Reform Act of 1986 (TRA), Congress changed the graded vesting schedule to require that a participant begin to vest after no more than 3 years

death, normal retirement at age 65, early retirement, disability, or attaining age 50.

On April 27, 1987, Halliburton submitted an application to respondent's Dallas, Texas, Key District for determination that the Plan continued to qualify under 401(a). On the same date, Halliburton submitted an application to such office for an initial determination for the IMCO Plan, a spinoff[2] of the Halliburton Plan. On September 7, 1988,

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of service and be completely vested after no more than 7 years of service. Pub. L. 99-514, sec. 1113(a), 100 Stat. 2446. Such amendment applies to plan years beginning after Dec. 31, 1988. TRA sec. 1113(e), 100 Stat. 2448.

[2] A "spinoff"{ is defined as the "splitting of a single plan into two or more plans." Sec. 1.414(1)-1(b)(4), Income Tax Regs.

respondent issued a proposed adverse determination letter which concluded that the Halliburton Plan had experienced a partial termination in 1986 due to the large workforce decline which caused a drop in plan participation in the Plan during such year, and that, because affected employees had not been vested in their accrued benefits as required by section 411(d)(3), the Plan no longer qualified under section 401(a). Respondent also issued a proposed adverse initial determination letter with respect to the IMCO. Plan, holding that it failed to qualify because the Halliburton Plan, of which the IMCO Plan was a spinoff, did not qualify.

After additional correspondence and administrative conferences, Halliburton filed the instant declaratory judgment action disputing and seeking review of

respondent's proposed determination. Mr. Nash, a former employee of Halliburton who had been laid off in 1986, filed a petition in support of respondent's proposed determination. Respondent filed a motion to dismiss both petitions for lack of jurisdiction, claiming that each petitioner had failed to exhaust administrative remedies. We denied such motion. Halliburton Co. v. Commissioner, 98 T.C. 88 (1992). Subsequently, respondent filed a second motion to dismiss, claiming that Halliburton had failed to notify affected parties of the request for determination, which motion we also denied. Halliburton Co. v. Commissioner, T.C. Memo. 1992-533, we denied respondent's motion to compel discovery to supplement the administrative record.

Accordingly, we now reach the merits

of the partial termination issue. If we decide that a partial termination of the Halliburton Plan occurred in 1986, the Plan may be disqualified because participants affected by such partial termination have not been vested in their accrued benefits. In respondent's response to the amicus brief filed by the Profit Sharing Committee of the Halliburton and IMCO Plans, respondent stated that, if such affected participants were immediately vested in accrued benefits, respondent would issue a favorable determination letter retroactive to the date of the partial termination. Furthermore, if we decide that a partial termination occurred, both the Profit Sharing Committee and respondent ask that we identify the affected participants entitled to immediate vesting of accrued benefits. A decision as to the status of

the Halliburton Plan will resolve the IMCO Plan's qualified status.

Halliburton and its controlled group constitute one of the world's largest and most diversified oil field services and engineering and construction organizations. Halliburton's business is divided into three principal categories: Oil field services and products; industrial engineering and construction services; and marine engineering and construction services. During 1986, the oil field services and products business was a major provider of products and services, both onshore and offshore, to the exploration and production segments of the petroleum industry. The engineering and construction categories of Halliburton's business provided services to the petroleum industry, as well as to other types of customers. The marine

engineering group performed services predominately for the petroleum industry, including the design, fabrication, and installation of offshore structures. Approximately three-quarters of the consolidated net revenues of Halliburton controlled group is derived from the services performed for the petroleum industry.

During 1986, however, a sharp decline in the oil business occurred, which severely disrupted Halliburton's business. During December 1985, the price of oil began to collapse due to overproduction in the Middle East and slack demand in oil-consuming countries. During the period beginning December 1985 to August of 1986, the price of oil fell from $27 per barrel to $10 per barrel. The U.S. oil production rate also dropped to its lowest level since 1977. As a consequence of

tumbling prices, oil exploration and drilling fell drastically. Reinvestment in exploration and production fell to their lowest levels since World War II. The steepest decline occurred during the first 7 months of 1986. The rotary rig count fell from 1,950 during December 1985 to 686 during July 1986, which was the fewest in the 46 years such data had been compiled. Halliburton's profit is closely tied to the domestic rotary rig count. As drilling operations shut down, demand for oil field services virtually disappeared. A report by the National Petroleum Council, a Federal advisory committee to the Secretary of Energy, stated:

> While the recent oil price decline has affected all segments of the industry, it has been particularly onerous for the oil field service industry. Eighty percent of the

> recent increase in unemployment in the oil and gas extraction industry has occurred in this area. ["Factors Affecting U.S. Oil & Gas Outlook", Report of the National Petroleum Council 23 (February 1987).]

The report went on to state that employment in the oil service industry dropped from 315,000 during December 1985 to 206,000 during December 1986. Id. at 135.

Halliburton was faced with two options: Cut costs or go out of business. Halliburton responded to the crisis with a broad array of cost-cutting measures and did not merely attempt to reduce it staffing levels. The capital budget was slashed, and the dividend was cut by 44 percent. In December 1985, before taking other measures to reduce personnel, Halliburton announced that, during the

period beginning January through March 1986, the age at which an employee was eligible to take early retirement would be lowered from 55 to 50. The letter announcing such program stated that:

> This temporary change in the retirement policy is being made due to our existing work load and business forecasts for the immediate future. * * * It is for the purpose of encouraging early retirements at this time in our attempts to reduce our workforce in line with our business. While we had hoped that normal attrition would accomplish our objectives, additional reductions may be necessary. For those of you who may have been contemplating early retirement, we urge your serious consideration during this period which might possibly save the job of

another employee.

Two additional 3-month "window periods" for early retirement were subsequently announced for April through June and October through December 1986. Early retirees could take advantage of certain benefit distribution options not available to vested terminees and could participate in a retiree health plan not available to vested terminees. Employees who took early retirement did so voluntarily and were not forced out of their jobs. Halliburton also implemented a wage freeze during March 1986 and a furlough program during June 1986 under which many employees, including Halliburton's executives, were asked to take every eighth week off without pay. The furlough program permitted Halliburton to retain more of its employees and so reduce job losses.

Halliburton also resorted to involuntary layoffs in order to reduce its work force. The number of layoffs during each month of 1986 generally tracked the size of the drop in oil prices for such month: In months where the price drop was sharp, the number of layoffs was also large, but, as the price of oil leveled off toward the end of the year, the number of layoffs also stabilized at a lower level. Halliburton's 37-percent overall decline in service personnel closely approximated the industry's 35-percent overall decline in employment. Even with its cost-cutting measures, Halliburton posted record operating losses during 1986.

On January 1, 1986, the Halliburton Plan had 19,017 participants, and during such year, 5811 new participants joined the Plan, making a total of 19,598

participants. Participants leaving the Plan during 1986 fell into the following categories: 1,141 plan participants elected to take early retirement either at the normal early retirement age or at the lower age permitted during the window periods; 38 participants retired at normal retirement age; 22 participants died; 264 were terminated for cause; and 797 participants voluntarily left their jobs with Halliburton. Nearly all of the voluntarily resigning participants made statements of their reasons for leaving their jobs, but none said that they were leaving because of anticipated discharge. Most of such employees cited personal reasons for leaving; others were dissatisfied with their jobs. Additionally, 5015 participants in the Plan were involuntarily terminated, of which 224 were fully vested, 4,560 were

partially vested, and 231 had not been participants long enough to have received an allocation of employer contributions to the Plan, and so such 231 participants had zero balances in the accounts subject to the plan vesting schedule.

A number of participants in the Plan transferred to employment with employers related to Halliburton

A number of participants in the Plan transferred to employment with employersrelated to Halliburton, but not covered by the Plan, ceasing participation inthe Plan for such reason. During 1986, Halliburton combined its IMCO Services Division with a division of Dresser Industries to form a joint venture called M-I Drilling Fluids Co. (M-I), which would permit Halliburton to compete moreeffectively in the drilling fluids business. As a consequence of the M-I

venture, 437 participants transferred to M-I and consequently left the Halliburton Plan. Four hundred twenty-three IMCO employees who terminated employment and participation in the Plan in 1986 for other reasons, such as retirements, layoffs, and voluntary resignations, are included in other categories of terminated employees.[3] All participants who transferred to M-I were fully vested in their account balances at transfer. Additionally,Halliburton allowed the participants who transferred to M-I and

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[3] In a subsequent submission, Halliburton stated that 423 IMCO participantshad transferred to the M-I joint venture; however, based on other information in the administrative record, we find that such statement is in error, and should have read 437. We have accordingly treated the number of IMCO transferees as 437.

were employed on November 30, 1986, to receive an allocation of employer contributions and forfeitures regardless of their employment status on December 31, 1986,the date on which the Plan provided such allocations be made. During 1987, Halliburton spun off the account balances of the 437 IMCO transferees from the Halliburton Plan to form the IMCO Plan for the benefit of the IMCO transferees. Effective March 1, 1987, M-I adopted its own Profit Sharing Plan, in which theIMCO transferees were immediately eligible to participate. Additionally, six participants transferred to affiliates of Halliburton other than M-I. Suchtransferees received vesting service credit under the Plan for work performed for the affiliate, and so may continue to vest in their unvested accruedbenefits under the Plan. Such transferees became

participants in theaffiliates' plans, and are credited with vesting service for the entire periodof service with members of the Halliburton controlled group.

Toward the end of 1986, the price of oil began to recover somewhat, because oil producers agreed to return to a fixed price system. The number of operating rigs also began to rise with the oil price recovery. The administrative record reveals that during the period beginning 1987 through 1989, Halliburton rehireda total of 1,279 participants who had left the Plan during 1986. Eight hundredsixteen of such persons were rehired during 1987, 371 were rehired during 1988,and 92 were rehired during 1989. Of the rehired group, 1,124 persons had beeninvoluntarily laid off during 1986, of whom 45 were fully vested, 1,039 werepartially vested, and 40 had zero

balance accounts. Of such rehiredparticipants, 742 were reemployed during 1987, 311 were rehired during 1988, and71 were recalled during 1989. Halliburton contacted many more former participants, but it was unsuccessful in its attempts to rehire them.

Under the Plan, if a participant terminated employment prior to full vesting,and received a cash distribution of his vested account balance, the unvested portion of such account balance would be forfeited upon the later of a 1-yearbreak in service or 1 year from the date of the distribution. If aterminated participant did not receive a cash-out distribution, the nonvestedportion of such participant's account balance would be forfeited after a 5-yearbreak in service.

Under the Plan, a rehired employee automatically reenters as a participant if

such employee is rehired within a year of termination, such employee's period of severance amounts to less than a 5-year break in service, or such employee was vested at the time of severance. If such an employee did not receive a cash distribution from the Plan on severance, the forfeited portion of such employee's account balance was restored on reentering the Plan. If such are hired employee had received a cash-out distribution on severance, such employee could "buy back" any forfeited amounts by recontributing such distribution within 5 years of rehire.

The changes in Plan participation may be summarized in the following table:

| 1986 Changes in Plan Participation | |
|---|---|
| Deaths | 22 |
| Retirees | |
| Normal retirements | 38 |

| | | |
|---|---|---|
| Early retirements | | 1,141 |
| Terminations for cause | | 264 |
| Transferees | | |
| To M-I | | 437 |
| Other affiliates | | 6 |
| Voluntary separations | | 797 |
| Involuntary separations | | |
| Fully vested | 224 | |
| Partially vested | 4,560 | |
| Zero balance accounts | 231 | |
| | | 5,015 |
| Total 1986 decrease in participation | | 7,720 |
| Participants at beginning of 1986: | | 19,017 |
| Participants added in 1986 | | 581 |
| Total | | 19,598 |

Under the Plan, forfeitures are allocated to participants employed as of theend of the year the forfeiture occurs, or to participants who have terminated

employment in such year by reason of death, disability, or retirement. Forfeitures are apportioned among participants according to the ratio which the participant's basic earnings bear to the total basic earnings of all eligibleparticipants. In accordance with section 411(d)(3), the Plan provides that, upon its partial termination, the rights of each participant and beneficiary affected by such partial termination will be fully vested and nonforfeitable.

The amount of potential forfeitures resulting from the 1986 reduction inparticipation in the Plan totaled $ 55.7 million. Restorations of account balances to rehired participants reduced the amount of such potential forfeitures to $ 52.7 million. Since April 30, 1987, such funds have been heldin a segregated fund, together with the earnings thereon, and

will be distributed to either affected former participants or the accounts of remaining participants when a final decision of the partial termination issue determines which group is entitled to them. During 1986, the Plan approximately $ 1.1 billion in assets, and potential forfeitures represented approximately 4.8 percent of its asset value.

Under the Halliburton Plan, no possibility exists for Plan assets to revertto Halliburton upon termination or partial termination of the Plan. No possibility exists for any amount of potential forfeitures resulting fromterminations to reduce Halliburton's contributions to the Plan or otherwise benefit Halliburton. Neither the reduction in participation nor the allocation of forfeitures among remaining participants resulted in prohibited

discrimination in favor of highly compensated employees. Discussion Before turning to the merits of the parties' contentions, we note preliminarily that respondent bears the burden of proof herein because respondent failed to issue a final determination prior to the filing of the instant declaratory judgment action. Rule 217(c)(1)(B). Such burden, however, plays only a limited role where, as here, the decision is based on a fully stipulated administrative record. Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154, 157 (1984). Such burden has no bearing on the weight to be given a party's legal arguments. BBS Associates, Inc. v. Commissioner, 74 T.C. 1118, 1121-1122 (1980), affd. without published opinion 661 F.2d 913 (3d Cir. 1981). With the foregoing in mind, we consider whether the

Halliburton Plan sustained a partial termination for tax purposes in 1986.

General Discussion of the Partial Termination Rule

Section 411(d)(3) provides that, in the event of a partial termination of aqualified plan, the rights of affected employees to benefits accrued to the dateof such partial termination shall be nonforfeitable, to the extent the plan is funded, as of the date of such partial termination. Such statutory provision, enacted as part of the Employee Retirement Income Security Act of 1974 (ERISA), codified a rule in the pre-ERISA regulations amplifying the prior statute, whichhad simply required vesting of benefits upon "termination" of a plan. Employee Retirement Income Security Act of 1974, Pub. L. 93-406, sec. 1012(a), 88 Stat.912; H. Conf. Rept. 93-1280, at 277

(1974), 1974-3 C.B. 415, 438; S. Rept.93-383,at 50 (1973), 1974-3 C.B. (Supp.) 80, 129; sec. 1.401-6(b)(2), Income Tax Regs., T.D. 6675 (Sept. 16, 1963); see also Anderson v. Emergency Medicine Associates, 860 F.2d 987, 991 (10th Cir. 1988). The regulations promulgated under section 411(d)(3), which essentially restate the pre-ERISA regulations, provide that the question of whether a partial termination has occurred is to be resolved on the basis of all the facts and circumstances of the particular case. Sec. 1.411(d)-2(b)(1), Income Tax Regs. Such circumstances include "the exclusion by reason of a * * * severance by theemployer, of a group of employees who have previously been covered by the plan." Sec. 1.411(d)-2(b)(1), Income Tax Regs. Such an exclusion has come to be knownas a "vertical partial termination".

In re Gulf Pension Litigation, 764 F. Supp. 1149, 1163 (S.D. Tex. 1991). It is such a situation that we consider in the instant case. Neither the Code nor the regulations explicitly define what constitutes apartial termination. Consequently, courts have relied on legislative history,as well as prior judicial and administrative interpretations of the rule. One long-standing concern of Congress, the courts, and respondent is that a reduction in plan participation may result from abuse, bad faith, or misconduct by the employer. Congress was concerned that an employer could establish aforfeitable plan, enjoying the tax benefits flowing therefrom, and then terminate it, thus causing the assets to revert to the employer with favorable tax consequences. H. Rept. 87-378, at 16 (1961), 1962-3 C.B.

261, 275-276. An abuse also arises when an employer excludes plan participants in a predatoryeffort to profit from subsequent forfeitures or diminished contribution requirements. Kreis v. Charles O. Townley, M.D. & Associates, P.C., 833F.2d 74, 80 (6th Cir. 1987). Additionally, a bad motive may be indicated if the financial health of a plan suffers because of reduced contributions arising out of a decline in participation. Id. Furthermore, the size of the forfeitures falling to continuing participants may also indicate an improper motive for the reduction in plan participation. Id.

The record in the instant case, however, shows that Halliburton had noimproper or bad motive for terminating plan participants in 1986. Halliburton did not stand to gain anything by the 1986 reductions in Plan participation. The

parties agree that Halliburton's contributions to the Plan will not be reduced because of the potential forfeitures resulting from the 1986 reductions in participation. Furthermore, the Plan does not allow Halliburtonto create a reversion of plan assets to itself by excluding participants. The events of 1986 had no adverse effect on the financial health of the Plan. Nodiscrimination in favor of highly compensated participants resulted from thereduction in participation. Additionally, the relative size of the forfeituresto the total assets of the Plan [4] and the fact that they would be divided amongover 11,000 continuing participants does not indicate that Halliburton had

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[4] The parties agree that the forfeitures constituted only 4.8 percent ofPlan assets in 1986.

anyintent to create an improper windfall for the remaining participants.

The record clearly establishes that the reduction in Plan participation resulted from emergency measures designed to reduce Halliburton'scosts, including personnel costs, in the face of a collapse in the demand forits services. Halliburton's business is providing services to oil drillers.Consequently, its financial health is heavily dependent upon the price of oil and level of drilling activity. The price collapse which occurred during 1986 removed economic incentives for the exploration and drilling activity on which Halliburton's businesses depended. Halliburton's actions appear to us to be prompted by a crisis in its business, which created a need to pare expenses, including personnel costs, in order to survive. Although

certain interestedparty comments suggest that Halliburton possessed an improper motive, we find such comments outweighed by other facts in the record. Rather, we think it is clear that the staff reductions taken in response to Halliburton's business emergency were not the result of bad faith and were not intended to take improper advantage of the rules related to tax-qualified retirement plans.

Halliburton argues that our inquiry into the facts and circumstances surrounding the 198€ drop in Plan participation should end at the point of finding a lack of abuse, contending that the sole purpose of the partial termination rule is to prevent employer abuse. We disagree. While the foregoing discussion demonstrates that one purpose of the rule is to preve tabuse, the rule

has the additional purpose of protecting employees' legitimate expectations of benefits. Gluck v. Unisys Corp., 960 F.2d 1168, 1182-1183 (3d Cir. 1992); Amato v. Western Union Intern., Inc., 773 F.2d 1402, 1409 (2d Cir. 1985); <=16> United Steelworkers of America v. Harris & Sons Steel Co., 706 F.2d 1289, 1298 (3d Cir. 1983). Tax laws governing qualified plans contain a variety of rules which penalize employers who seek to abuse such rules for tax advantages, such as the permanence, exclusive benefit, and discriminatory vesting rules. Sec. 411(d)(1)(A); sec. 1.401-1(b)(2) and (3),Income Tax Regs. Such rules operate by stripping away the tax benefit associated with qualified plans, while the partial termination rule operates by requiring that plan assets be applied to their ostensible purpose of benefiting participants. Consequently, the

partial termination rule does not serve exclusively as a sanction for employer abuse, but also serves to protect employees "who would otherwise be left out in the cold after a drastic and sudden change in the plan." Chait v. Bernstein, 835 F.2d 1017, 1021 (3d Cir. 1987). To say that the reason for awarding plan assets to participants is simply to punish employer abuse ignores one of the fundamental purposes of therules governing qualified plans, the protection of employee retirement benefits.See S. Rept. 93-383, at 1 (1973), 1974-3 C.B. (Supp.) 80.

The 1974 legislative history of section 411(d)(3) does not indicate that Congress intended to limit the application of the rule to abusive situations,for it states simply that "Examples of a partial termination might include, under certain

circumstances, a large reduction in the work force". S. Rept.93-383, at 50 (1973), 1974-3 C.B. (Supp.) 80, 129. The foregoing statement is not limited to partial terminations that occur only when employer abuse ispresent. We note that Congress did not indicate any disagreement with the developing administrative interpretation of the partial terminationrule, which held that a layoff due to business circumstances could cause apartial termination. See, e.g., Rev. Rul. 72-510, 1972-2 C.B. 223, supersededby Rev. Rul 81-27, 1981-1 C.B. 228.

Instead, Congress stated in the 1974 legislative history that section 411(d)(3) continued the partial termination rule as in effect prior to the enactment of such paragraph. H. Conf. Rept. 93-1280, at 277 (1974), 1974-3 C.B.415, 438; S. Rept. 93-383, at 50 (1973), 1974-3 C.B. (Supp.)

80, 129; see also <=24> Anderson v. Emergency Medicine Associates, 860 F.2d 987, 991 (10th Cir.1988). At such time, the partial termination rule was stated in the regulationsissued under the predecessor to section 411(d)(3), which regulations providedthatWhether or not a partial termination of a qualified plan occurs when a group>[?7h

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100 T.C. No. 15; 16 E.B.C. 1929of employees who have been covered by the plan are subsequently excluded fromsuch coverage * * * by reason of being discharged by the employer, will bedetermined [*26] on the basis of all the facts and circumstances.Sec. 1.401-6(b)(2), Income Tax Regs., T.D. 6675 (Sept. 16, 1963). Congress thus indicated approval of the facts and

circumstances approach tothe partial termination issue developed in such regulations, an approach which did not limit the operation of the rule to situations involving employer abuse. The facts and circumstances approach of the pre-ERISA regulations was incorporated in the regulations issued under section 411(d)(3). Sec.1.411(d)-2(b)(1), Income Tax Regs., T.D. 7501 (Aug. 22, 1977). The foregoing history of the partial termination rule refutes Halliburton's argument that such rule should apply only in cases of employer abuse. Consistent with the foregoing, this Court has expressly held that layoffs caused by economic circumstances can cause partial termination of a plan. Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. at 160-161; Peter M. Boruta, M.D., P.C. v. Commissioner, T.C. Memo. 1988-172. In

Tipton, we stated as follows:

> We infer * * * a broader ameliorative purpose than simply preventing the reversion of contributions to an owner-employee. We think that Congress inenacting * * * [the predecessor of section 411(d)(3)] sought to protect employees from forfeiting their retirement benefits upon termination of a plan. This broader congressional purpose would be ill-served by holding the presenceor absence of an intent or purpose to deprive employees of benefits determinative of whether a termination had occurred. Where a significant percentage of plan participants are discharged, the effect is the same regardless of the employer's intent; unless the discharge is treated as apartial

> termination, a significant percentage of plan participants are compelledto forfeit accrued but unvested retirement benefits.
>
> Petitioner's argument boils down to the simple assertion that it was not at fault. Although this may be true, neither were the discharges the fault of the discharged employees, who nevertheless were compelled to forfeit their retirement benefits. [83 T.C. at 160-161; fn. ref. and citations omitted.]

Accordingly, the fact that there is no evidence of abuse or bad faith on the part of Halliburton in connection with the 1986 reduction in force will not per se insulate Halliburton from a finding that a partial termination of the Plan occurred

in such year. [5]

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[5] We note that the Court of Appeals for the Third Circuit has indicated thata partial termination should be found only if the reductions in participationare so large that a plan appears to have been created as a mechanism to reducetaxes, rather than to provide benefits. Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 151 (3d Cir. 1987), affd. in part and revd. in part onother issues 489 U.S. 101 (1989). However, we perceive no conflict between Bruch and our decision in Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984), because it seems that any reduction largeenough to give rise to an inference of employer misconduct would also result in a finding that a partial termination had occurred under the facts and circumstances test as applied in Tipton. We also find significant that the Court of Appeals for the Third Circuit did not require direct evidence of abuse in order to sustain a finding of partial termination, but allowed the test of whether abuse was present to be inferred through the size of the reduction inplan

Halliburton also contends that the partial termination rule was not designed to protect employees from periodic layoffs which occur in cyclical industries. Whatever the merits of such contention in another context, we do not find it applicable in the instant case. The collapse of the oil market was not a mererecurrent downturn in the business cycle. Rather, it appears to have been an extraordinary event resulting from a pronounced imbalance of market forces. The unusual nature of the events of 1986 are illustrated by the drastic adjustments which Halliburton had to make in all areas of its business, from its capital spending and dividend to its workforce. Halliburton's losses in 1986 prevented it from making a contribution to its Plan for

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participation. Consequently, the result under either approach would be the same.

the first time since the Plan's establishment in 1944. Consequently, we do not view the events of 1986 as amere cyclical downturn.

An additional circumstance which courts attempt to identify in deciding whether a partial termination has occurred is the occurrence of a major corporate event in connection with the reduction in plan participation. Generally, the closing of a plant or division, or a restructuring incident to amerger, have been held to constitute major corporate events. Weil v. Retirement Plan Administrative Committee, 750 F.2d 10, 12 (2d Cir. 1984) (Weil I); In re Gulf Pension Litigation, 764 F. Supp. at 1169-1170. A>[?7h

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"major corporate event" is not necessarily a prerequisite to finding that a partial termination has occurred, as layoffs due

to nothing more than a downturnin business can trigger a partial termination. Tipton & Kalmbach, Inc.v. Commissioner, 83 T.C. at 160-162. Whether or not the reason for a reduction in participation may be termed a "major corporate event", however, such cause needs to be identified because the drop in participation attributable to such cause which is considered in deciding whether a partial termination has occurred. Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 151 (3dCir. 1987), affd. in part and revd. in part on another issue 489 U.S.101 (1989); Weil I, supra. Reductions in participation unrelated to such cause are not relevant to the question of whether a partial termination occurred, for they would have occurred even in its absence. In re Gulf Pension Litigation, 764 F. Supp. at 1168. The downsizing caused by the 1986 collapse

in the oil market was not the type of major corporate event generally found in other cases involving partial terminations. Although such crisis prompted a major restructuring of Halliburton, much like a plant closing or postmerger consolidation, there are, nonetheless, certain features of Halliburton's response to the crash in oil prices which distinguish it from a typical major corporate event. Halliburton did not permanently restructure its operations, as occurred in other cases involving the closure of a division or plant. Instead, Halliburton engaged in a temporary economizing measure, affecting all its operations, which was aimed at meeting a business emergency. The 1986 downturn in business seems, given the facts in the record, to have been a transitory economic phenomenon, and the

staff reductions which accompanied it seem to have been a response which was temporary, rather than permanent, in nature. The fact that Halliburton was able to rehire a significant number of laid-off employees in the immediately succeeding years demonstrates the transitory nature of the staff reductions. Consequently, the circumstances surrounding the reduction in plan participation are less suggestive of a partial termination than would be the case had a permanent restructuring of the firm occurred, e.g., the closure of a plant ordivision.

One of the most important facts and circumstances bearing on the vertical partial termination issue is the size of the drop in plan participation resulting from the event causing such reduction. Kreis v. Charles O.Townley, M.D. &

Associates, P.C., 833 F.2d 74, 79 (6th Cir. 1987), and cases cited therein. In order to assess whether such a drop is sufficiently large to warrant the conclusion that a plan has partially terminated, respondent has developed two tests: The significant number test and the significant percentagetest.

The Significant Number Test

Respondent urges that we should apply the significant number test to determine whether a partial termination of the Halliburton Plan occurred, while Halliburton argues that such test should not be applied. In Tipton & Kalmbach, we specifically reserved for another day the decision on whether the significant number test should be used to determine whether a plan has experienced a partial termination. Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. at 160 n.5.

The significant number test first appeared in respondent's revenue rulings onthe partial termination issue. The test was first announced in a 1972 revenue ruling, which was superseded by a 1981 ruling reaffirming the test. Rev. Rul.81-27, 1981-1 C.B. 228, superseding Rev. Rul. 72-510, 1972-2 C.B. 223. In that ruling, respondent stated that a partial termination occurred where 95 out of 165 participants of a plan were terminated due to the closing down of one of theemployer's divisions. The ruling's stated reason for such conclusion was that a"significant number" of participants were terminated. Because the significant number test was announced in a revenue ruling, it is entitled to no special deference. Higgins v. Commissioner, 312 U.S.212, 215 (1941); Helvering v. New York Trust, 292 U.S. 455 (1934); Stark v.

Commissioner, 86 T.C. 243, 250-251 (1986). As has beenstated by the Court of Appeals for the Fifth Circuit, the court to which an appeal in the instant case would lie:

> a [revenue] ruling is merely the opinion of a lawyer in the agency and must beaccepted as such. It may be helpful in interpreting a statute, but it is not binding on the Secretary [of the Treasury] or the courts. It does not have the effect of a regulation or a Treasury Decision. [ Stubbs, Overbeck &Associates v. United States, 445 F.2d 1142, 1146-1147 (5th Cir. 1971).]

Accordingly, a ruling or other interpretation by the Commissioner is only as persuasive as her reasoning and the precedents upon which she relies. Gordon v. Commissioner, 88 T.C. 630, 635 (1987);

Reinhardt v.Commissioner, 85 T.C. 511, 520 (1985); Wolfers v. Commissioner, 69 T.C.975, 989 (1978); Hartman v. Commissioner, 34 T.C. 1085 (1960), affd. per curiam 296 F.2d 726 (2d Cir. 1961).

The rationale for the significant number test, however, is not readily apparent. The fact situation presented in Rev. Rul. 81-27, supra, shows that the plan experienced a 57.57 percent reduction in participation, which would have supported a finding that a partial termination occurred under the significant percentage test, discussed infra. Consequently, it does not appear that, at least in the situation presented in the ruling, resort to the significant number test was required to remedy a deficiency in the significantpercentage test. Moreover, in Rev. Rul. 72-439, 1972-2 C.B. 223, the Commissioner did not rely upon

the significant number test in concluding that a partial termination occurred when 120 of 170 plan participants were terminated, but based her holding exclusively on the significant percentage test. The courts have been hesitant to accept the significant number test. One recent decision noted that:

> Although courts have given lip service to the significant number test, they have been reluctant to use this test as a basis for holding that a partial termination has or has not occurred. * * * No court has found a partialtermination under the significant number test. [In re Gulf Pension Litigation, 764 F. Supp. at 1163-1164; citations omitted.]

In one case, a District Court refused to find a partial termination had occurred under the significant number test even

though 415 participants were terminated where such terminees constituted only 2.5 percent of plan participants. Ehm v. Phillips Petroleum Co., 583 F. Supp. 1113, 1115-1116 (D. Kan.1984); see also Morales v. Pan American Life Insurance Co., 718 F. Supp.1297, 1302-1303 (E.D. La. 1989), affd. 914 F.2d 83 (5th Cir. 1990) (court considered only percentage test in holding no partial terminationoccurred where 128 participants, constituting 15.3 percent of participants, were laid off).

Only in Weil I, 750 F.2d at 12, has a court suggested that the absolute number of terminations should be determinative of the partial termination issue. Such suggestion, however, appears to be dicta, as the issue before the Court was whether the record in the case was sufficient to enable the District Court to grant a motion for summary judgment on the partial

terminationissue. Weil I, supra. The District Courts hearing such cases, moreover, have relied only on the percentage test in deciding the partialtermination issue. In re Gulf Pension Litigation, 764 F. Supp. at 1164n.6. Furthermore, the Court of Appeals for the Third Circuit has held that, inview of the language of section 411(d)(3) and the purpose of the partialtermination rule, the appropriate focus of the inquiry was the "percentage of employees in the plan who were affected by the transaction said to constitute apartial termination." Bruch v. Firestone Tire & Rubber Co., 828 F.2d134, 151 (3d Cir. 1987), affd. in part and revd. in part on other grounds 489 U.S. 101 (1989). The Court of Appeals for the Second Circuit hasapparently adopted the view of Bruch, for, in a subsequent ruling on the

case which gave rise to Weil I, it held that the percentage decrease in plan participation was to be considered in deciding the partial termination issue, and made no mention of the significant number test. Weil v. RetirementPlan Administrative Committee, 913 F.2d 1045 (2d Cir. 1990) (Weil II), vacated in part on other grounds 933 F.2d 106 (2d Cir. 1991) (WeilIII).

The Significant Percentage Test

The other test used to measure the drop in plan participation for purposes of considering whether a partial termination has occurred is the significant percentage test. Such test was also first announced in one of the Commissioner's revenue rulings, Rev. Rul. 72-439, 1972-2 C.B. 223. Such ruling held that a 70.59-percent reduction in plan participation resulted in a partial termination of the plan. The

significant percentage test has generally been accepted by courts ruling on the partial termination issue. See, e.g., Bruch v. Firestone Tire & Rubber Co., supra at 151; Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C at 159-160; In re Gulf PensionLitigation, 764 F. Supp. at 1163-1164. Indeed, one court has noted that the percentage of participants excluded from the plan is the most persuasive evidence of whether a partial termination has occurred. Kreis v.Charles O. Townley M.D. & Associates, P.C., 833 F.2d at 79.

The Test to be Applied

After due consideration, we apply the significant percentage test in the instant case, rather than the significant number test. Doing so appears to us to be more consistent with the overall nature of the partial termination inquiry, an inquiry

which focuses on the effect that a reduction in participation has on the plan as a whole. The legislative history of ERISA also suggests that emphasis on the relative size of the reduction is appropriate, giving as an example of a partial termination "a large reduction in the workforce". S. Rept. 93-383, at 50 (1973), 1974-3 C.B. (Supp.) 80, 129; H. Rept.93-807, at 65 (1974), 1974-3 C.B. (Supp.) 236, 300. Accordingly, we think that Congress intended that the magnitude of a reduction in plan participation generally should be judged in relation to the size of the plan, and not according to the absolute number of persons terminated from participation. In other words, a workforce reduction of 1 percent should not be significant evenif it involves 100 or 200 employees. An additional reason for using the significant percentage test

over the significant number test is that use of the significant number test would have a disproportionate impact upon larger plans and would unnecessarily complicate their administration. If, as Rev. Rul. 81-27, 1981-1 C.B. 228,superseding Rev. Rul. 72-510, 1972-C.B. 223, holds, exclusion of 95 participants can cause a partial termination, it would seem that even minor adjustments to a large workforce, or even normal turnover (if no major corporate event were, could cause partial terminations to occur with some frequency. [6] Consequently, the partial termination vesting rule could be turned

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[6] For instance, Halliburton terminated 264 plan participants in 1986 forcauses unrelated to its business downturn. Under the significant number test,such a number of layoffs could suggest that a partial termination occurred, a plainly absurd result.

into a mechanism for providing severance benefits instead of retirement benefits, a purpose which Congress did not intend the vesting rules to serve. 119 Cong.Rec. 30384-30385 (1973) (statement of Sen. Javits). Widespread application ofthe significant number test might thus discourage large employers from maintaining pension plans, contrary to the congressional policy of encouraging employers to provide such retirement benefits. S. Rept. 93-383, at 1-2 (1973),1974-3 (Supp.) 80, 80-81.

Respondent argues that the regulations promulgated under section 411(d)(3) seem to permit use of the significant number test, as they provide that one of the facts and circumstances to be considered in deciding whether a partialtermination has occurred is "the exclusion, by reason of a * * * severance bythe employer, of a

group of employees who have previously been covered by theplan". Sec. 1.411(d)-2(b)(1), Income Tax Regs. The regulation, however, does not define the phrase "group of employees". Accordingly, the regulation provides limited guidance in considering whether the significant number test is a valid test for deciding when a partial termination has occurred. Furthermore, the regulation does not suggest that the severance of a group of employees is tobe the only circumstance considered; rather, the decision is to be made on the basis of all the facts, of which the number of affected employees is only one.

Given the foregoing considerations, we do not find that use of the significant number test would be necessary here to remedy inadequacies in the significant percentage test. In the more than 20

years since the latter test was first applied, it has proven useful in a wide array of situations. Consequently, we decline to find that a partial termination has occurred in the instant case solely on the basis of the significant number test. Accordingly, even though the number of employees affected by Halliburton's reduction in force may be substantial or significant, such circumstance standing alone does not warrant a finding that the Halliburton plan experienced a partial termination in 1986.

The Measuring Percentage To Be Utilized in the Test

The significance of the percentage drop in establishing whether a partial termination has occurred generally depends on its size. The exact level at which it becomes determinative of the issue, however, is still somewhat ill defined.

As one court noted, there is no "magical figure at which a partial termination occurs". Bruch v. Firestone Tire & Rubber Co., 640 F. Supp.519, 530 (E.D. Pa. 1986), affd. on this issue 828 F.2d 134 (3d Cir.1987). Another court, however, has noted that often the percentage standing alone may be sufficiently large or small to decide the partial termination question. [7] Kreis v. Charles O. Townley, M.D. & Associates, P.C., 833 F.2d at 80. [*43] For instance, based on the decided cases, a drop in participation exceeding 50 percent was sufficient standing alone

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[7] We note, however, that the most recent revision of respondent's PlanTermination Handbook states that there is no fixed turnover rate whichdetermines whether a partial termination has occurred. Plan TerminationHandbook, 4 Administration, Internal Revenue Manual (CCH), sec. 252(6), at 21,150.

to establish that a partial termination had occurred. See Peter M. Boruta, M.D.,P.C. v. Commissioner, T.C. Memo. 1988-172, and cases cited therein. On the other hand, a drop of 2 to 3 percent has been thought to be sufficiently smallto preclude a finding that a partial termination has occurred. Bruch v.Firestone Tire & Rubber Co., 828 F.2d at 151.

Between the two extremes, where the percentage drop has not been sufficientin and of itself to establish that a partial termination has occurred, the surrounding facts and circumstances have been considered in conjunction with the percentage drop in order to decide whether the percentage drop is significant. Kreis v. Charles O. Townley, M.D. & Associates, P.C., 833F.2d at 79-80. A rule of thumb has developed that a percentage

drop of at least 20 percent is sufficient, if coupled with other circumstances, e.g., the closing of a plant or division, to suggest that a partial termination has occurred. [8] In re Gulf Pension

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[8] There are a number of possible reasons such figure came into use. A dropof 20 percent or more must be reported by the plan administrator to the plansponsor under the Employee Retirement Income Security Act of 1974 (ERISA), Pub.L. 93-406, sec. 4043(b)(3), 88 Stat. 1024. Additionally, respondent's Internal Revenue Manual formerly instructed agents to question whether a partialtermination had occurred when exclusion of 20 percent of plan participants occurred. Plan Termination Handbook, 4 Administration, Internal Revenue Manual(CCH), sec. 252, at 21,150. It has also been suggested that the 20-percent rule has its origin in a pre-ERISA annual report required to be filed with respondent by plan sponsors. The form asked whether a 20-percent drop in participation had occurred during the

Litigation, 764 F. Supp. at 1168; Morales v.Pan American Life Insurance Co., 718 F. Supp. at 1302-1303, and cases citedtherein. A drop of less than 20 percent has been considered significant only if accompanied by egregious abuse on the part of the employer, such as discrimination in favor of the highly compensated, manipulation of the pension rules to obtain tax benefits, creation of a reversion of plan assets to the employer, or an attempt to prevent employees from becoming vested in accrued benefits. In re Gulf Pension Litigation, 764 F. Supp. at 1164.

The regulations direct that all facts and circumstances are to be considered in deciding whether a partial termination has

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year. Laarman & Hildebrandt, Tax Management Portfolio 357,Plan Terminations and Mergers A-18(2) (1986).

occurred. Sec. 1.411(d)-2(b)(1),Income Tax Regs. Accordingly, we decline to accord talismanic significance to the 20-percent rule of thumb, but will regard the percentage drop in the light of the other facts and circumstances. As one court has said:

> The significant percentage which serves to determine whether there has been a partial termination has not been reduced to any specific number. Whatconstitutes a significant percentage is preeminently a matter of fact. * * * [ Babb v. Olney Paint Co., 764 F.2d 240, 242 (4th Cir. 1985).]

As noted above, however, no evidence of abuse exists in the instant case that would justify lowering the level at which the percentage drop in plan participation would be deemed significant.

Defining the Class of Affected Employees

Our next step is to decide the size of the drop to be utilized in applyingthe percentage test. The basic area of disagreement between the parties and the principal question in the instant case is how to define the class of employees to be included in calculating the percentage reduction. Halliburton contends that the class should be defined restrictively, thus minimizing the number to be considered in reaching the percentage, while respondent contends that the class should be defined broadly, maximizing such number.

A body of case law has developed on the participants who should be counted in the class. It is clear that not every employee separated from service in 1986 should be included in the affected employee class. Certain employees would

have terminated employment regardless of Halliburton's circumstances, and so should not be counted. Others who left may not have been within the class of plan participants which Congress intended to protect under the partial termination rules, and are likewise to be excluded. Consequently, each category of employee separations must be examined to decide whether it should be included forpurposes of the partial termination inquiry.

Classes the Parties Agreed to Exclude

The parties agree that certain classes of separated employees should not becounted in the partial termination percentage, and we accordingly exclude them. Such classes include: Deaths, 22; normal retirements, 38; terminations for cause, 264. The discontinuance of such employees' participation in the planis deemed not to be attributable to Halliburton's

reductions in force and sosuch employees are deemed not to have been affected by such action. In re Gulf Pension Litigation, 764 F. Supp. at 1168; <=84> Morales v.Pan American Life Insurance Co., 718 F. Supp. at 1302-1303. Moreover, the account balances of employees who died or retired at normal retirement age werefully vested upon occurrence of such events.

Halliburton also contends that 437 employees of the IMCO Division who weretransferred to the M-I joint venture and ceased participating in the HalliburtonPlan should not be counted. Halliburton bases its contention on the fact that they were fully vested in benefits accrued through the end of 1986, which werespun off into the IMCO Plan. Halliburton maintains that the IMCO Plan should be treated as a continuation of the IMCO employees' portion of the Halliburton

Plan and that a spinoff does not cause the discontinuance of the employees' participation in the original plan. See sec. 414(1). Furthermore, Halliburton points out that the IMCO participants are covered under a successorpension plan, the M-I Plan, maintained by a successor employer, the M-I DrillingFluids joint venture. The decided cases support the view that the transferred employees should not be counted for purposes of deciding whether a partial termination has occurred. In re Gulf Pension Litigation, 764 F. Supp.at 1165-1166; Morales v. Pan American Life Insurance Co., 718 F. Supp. at 1302-1303. Moreover, on brief, respondent concedes that the transferred employees should be excluded.

Accordingly, the foregoing categories of former participants will not be considered for purposes of deciding

whether a partial termination of the Plan occurred in 1986.

Classes the Parties Agreed To Include

All parties agree that 4,560 partially vested participants who were involuntarily terminated in 1986 should be counted for purposes of deciding whether a partial termination of the Halliburton Plan occurred in such year.

Classes on Which the Parties Disagree

1. Voluntarily Separated Employees

Halliburton and respondent disagree over the question of whether employees who voluntarily relinquished employment during 1986, either through early retirement or voluntary resignation, should be counted in deciding whether a partial termination of the Halliburton Plan occurred in that year. Respondent contends that such separations occurred as part of Halliburton's efforts to reduce the size

of its work force in such year, and so should be counted. Halliburton contends that such separations should not be counted because Congress intended the partial termination rules to protect only plan participants involuntarily separated from service. After due consideration, we agree with Halliburton. The case law overwhelmingly holds that employees who voluntarily separate from their employer should not be counted for purposes of deciding whether a partial termination has occurred. Anderson v. Emergency MedicineAssociates, 860 F.2d 987, 990 (10th Cir. 1988); Sage v. Automation, Inc.Pension Plan & Trust, 845 F.2d 885, 891 (10th Cir. 1988); Kreis v.Charles O. Townley, M.D. & Associates, P.C., 833 F.2d 74, 79 (6th Cir. 1987); Weil v. Retirement Plan Administrative Committee, 750 F.2d 10, 11-13 (2dCir. 1984); In re

Gulf Pension Litigation, 764 F. Supp. 1149,1166 (S.D. Tex. 1991); Morales v. Pan American Life Insurance Co., 718F. Supp. 1297, 1302 (E.D. La. 1989), affd. <=93> 914 F.2d 83 (5th Cir. 1990). [9] Furthermore, the regulations indicate that only employer-initiated terminations suggest that a vertical partial termination has occurred by defining such event in terms of a "severance by the employer" of plan participants. Sec. 1.411(d)-2(b)(1), Income Tax Regs.

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[9] Respondent as well has indicated acceptance of such position. In G.C.M.39,344 (Oct. 16, 1984), it was concluded that a partial termination did not occur where the drop in participation resulted from the employees' voluntarily relinquishing employment. The memorandum reasoned that employees do not need the protection from employer abuses afforded by the partial termination rule where they voluntarily leave their jobs.

Even if an employee resigns, however, the termination may still be counted if it is shown that the participant was constructively discharged, meaning that the employee resigned due to intolerable working conditions created by the employer. Kreis v. Charles O. Townley, M.D. & Associates, P.C.,supra at 81-82; Young v. Southwestern Savings & Loan Association, 509 F.2d 140, 144 (5th Cir. 1975). Moreover, employees who leave of their own accord after it is clear that there is no prospect of continuing to work for the employer may also be considered as having been involuntarily terminated. Collignon v. Reporting Services Co., 796 F. Supp. 1136, 1141-1142 (C.D.Ill. 1992); Morales v. Pan American Life Insurance Co., 718 F. Supp. at 1303.

In Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984), we did

not directly address the issue of whether voluntary separations were to be included for purposes of the partial termination calculation; however, the employees were referred to as having been "discharged" or "terminated", suggesting that employer-initiated separations are the relevant ones for such inquiry. Id. [10]

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[10] We note that some commentators have suggested that the Tax Court has heldthat voluntary separations are to be counted toward a partial termination. Laarman & Hildebrandt, Tax Management Portfolio 357, Plan Terminations andMergers, states at A-18(3) (1986):In Tipton & Kalmback, [sic] Inc. v. Comr., for example, the Tax Court, agreeing with the IRS, held that a significant percentage of participants leaving in asingle year is automatically grounds for a partial termination regardless of whether the employer initiated the departures. As a result, the opinion suggests that an employer can be

In the instant case, however, we hold that voluntary, non-employer-initiated terminations are not to be considered in deciding whether a partial termination has occurred.

Turning to the question of whether the employees who took Halliburton's offerof early retirement or who resigned

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involuntarily placed in a partial termination situation as a result of the departure of a significant percentage of employees, a result that can be particularly onerous for small employers because the departure of even a single participant may constitute a significant percentage. A careful reading of Tipton & Kalmbach, however, reveals no such holding, nor can any portion of the opinion be read to imply such a view of the law. Rather, the opinion seems to assume that all participants excluded from the plan were discharged by the employer, and does not state that any left of their own accord.

their positions were constructively discharged, resulting in involuntary separation from employment, we find that such was not the case. As Halliburton's downsizing was company-wide, we do not accept, as respondent argues, that employees had no choice but to leave. The situation of the instant case is therefore distinguishable from one in which the company's assets are sold or a discrete portion of the company, such as adivision or plant, shuts down. Accordingly, the instant case is distinguishable from Collignon and Morales, involving a sale of the employer's assets and termination of an entire division which led the courts to conclude thatemployees who resigned from their jobs should be included in the partialtermination calculation. See Collignon v. Reporting Services Co.,supra at 1142; Morales v. Pan American Life

Insurance Co., supra at 1303. Furthermore, some employees might leave their jobs of their own accord, even when economic conditions are bad, because of dissatisfaction with their situations or for personal reasons. The partial termination rule was not intended to protect such persons -- they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do. Moreover, vesting their benefits would not necessarily deter abuse by employers. Additionally, the circumstances of such separations do not indicate that such persons were constructively discharged from their positions. Almost all of theemployees counted as voluntarily resigning filled out a form giving the reasonsfor such action. None of such employees stated that he or she was

leaving because of anticipated discharge or layoff, nor did any claim that he or she had been forced to resign. [11] Accordingly, employees who are identified in the record as having voluntarily resigned their positions will not be counted in deciding whether a partial

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[11] Although some employee comment letters in the administrative recordsuggest otherwise, none of the commenting employees claim that they were compelled to falsely state that they were leaving voluntarily. Consequently, wedo not find the statements in the comment letters to outweigh departingemployees' earlier statements in the forms. Respondent also challengesHalliburton's characterization of the reasons offered by such participants forleaving their jobs, but, given that we must accept Halliburton's representationsin the administrative record as true for purposes of the instant case, Rule 217(b), we do not question their accuracy.

termination occurred.

Employees who chose early retirement similarly should not be counted forpurposes of deciding whether a partial termination occurred. The circumstances indicate that such employees voluntarily relinquished employment. In re Gulf Pension Litigation, 764 F. Supp. at 1168. The record shows that Halliburton simply made a general offer of early retirement benefits to all eligible employees, and each individual was free to accept it or not.Halliburton did not force its employees to choose between taking early retirement or being laid off. [12] Although

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[12] Certain comment letters claim that employees were forced to take earlyretirement, but such allegations seem based on second-hand information. Noperson filing a comment letter claimed to have been forced to retire. Accordingly, we give no weight to such

it is possible that the condition of Halliburton's business was a factor weighed by some retirees in deciding whether to accept Halliburton's offer of early retirement, such consideration does not make the resulting choice to retire involuntary.

Moreover, an early retirement offer does not amount to a constructive discharge where the employer gives the employee a choice between taking previously unavailable benefits or of continued work under the same conditions. Mitchell v. Mobil Oil Corp., 896 F.2d 463, 467 (10th Cir. 1990). The fact that an employee declining the early retirement offer may face the same risk of layoff as every other employee does not make acceptance of the offer coerced. Id.;

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comment letters.

Bodnar v. Synpol, Inc., 843 F.2d 190, 194 (5th Cir.1988). Only where the offer sufficiently alters the status quo so that the choices available to the employee leave the employee in a worse position than before can acceptance of the offer be considered involuntary. Bodnarv. Synpol, Inc., supra at 193. In the instant case, the employees were given a choice between taking early retirement, thus obtaining the benefit of distribution options not available to terminees and a retiree medical benefit plan, and continuing to work for Halliburton, taking the same chance of termination faced by other employees. Furthermore, because the Halliburton Plan provided that accrued benefits vested at age 50, no employees who were eligible for early retirement stood to lose any accrued benefits if such employees chose not to retire. Based

upon the record in the instant case, we find that the decision to take early retirement was the result of a rational weighing by the employees of the benefits offered early retirees by Halliburton versus the risks and rewards of continuing to work for Halliburton. Henn v. National GeographicSociety, 819 F.2d 824, 826 (7th Cir. 1987). Consequently, although Halliburton's liberalized early retirement program was prompted by its need to reduce its workforce due to adverse economic conditions, we find that the purposes of the partial termination rule would not be advanced by taking the early retirees into account, because the employees' decision to take advantage of the company'soffer was voluntary. Accordingly, we will not take into account participants who either voluntarily resigned or took early retirement in deciding whether a partial

termination occurred.

2. Fully Vested, Involuntarily Separated

An additional point on which the parties disagree is whether fully vested employees laid off by Halliburton should be counted toward the partialtermination number and percentage. We have not previously expressly ruled on such question; in Tipton & Kalmbach, we counted all participants leaving the plans, without stating whether they were fully or partially vested, in ruling that a partial termination hadoccurred. Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984). In the instant case, 224 fully vested participants were involuntarily terminated. Halliburton argues that such participants should be excluded because they do not stand to gain or lose any benefits based on whether the Plan

experienced a partial termination. Halliburton argues that the purposes of the partial termination rule, namely to protect participants from forfeiting rights to accrued, but unvested, benefits and to prevent employers from reaping a windfall due to reversions of amounts on which they have paid no tax, would notbe served by considering participants who forfeit nothing on leaving the Plan. Respondent argues that it is the significant contraction of a plan, and not the consequences of such event, which is determinative of whether a partial termination has occurred, and urges that all involuntarily terminated participants be counted, regardless of vesting status. We, however, need not decide the question because, even if we include such participants, as we set forth more fully below, the Plan did not experience a

partial termination. We accordingly include such employees in the calculation purely for illustrative purposes.

3. Participants With No Accrued Benefits at Separation

Two hundred thirty-one participants who terminated participation in the Planduring 1986, had no accrued benefits at the time they separated from service because they had not become eligible to receive an allocation by such time. Under the Halliburton Plan, an employee must be a participant on December 31,1986, or have terminated participation due to death, disability, or retirement in the year in order to receive an allocation of employer profit-sharing contributions or forfeitures for such year. Consequently, employees in their first year of participation separating prior to December 31, 1986 for reasons other than death,

disability, or retirement, accrued no employer-funded benefits and so forfeited nothing when they left the plan. Halliburton contends that, because such participants forfeited nothing, they should not be treated as "affected employees", as they stand to neither gain norlose from a decision that a partial termination of the plan occurred. Halliburton argues that only participants whose vesting rights to accrued benefits are put at risk by the partial termination should be considered affected employees. Halliburton accordingly uses the same rationale advanced to exclude fully vested employees from the relevant class. Respondent, on theother hand, argues that such terminees should be counted because resolution of the partial termination issue should turn on an examination of the reduction in plan participation as a

whole, regardless of the vesting status of the separated participants. As with the fully vested involuntary terminees, our decision in the instant case would not be affected whether we included them or not, so we decline to decide the issue. We include them in the calculation, however, purely for illustrative purposes.

4. Participants Transferred to Affiliates of Halliburton

Respondent contends that the six participants transferred to Halliburton affiliates besides M-I should be treated as affected employees because they were not accorded the same treatment as participants transferred to M-I, such as full vesting in their account balances under the Halliburton Plan. It appears, however, that such participants were accorded sufficient protections to warrant their exclusion from the affected class.

See In re GulfPension Litigation, 764 F. Supp. at 1165-1166. In the instant case, a transferred employee did not forfeit unvested benefits under the Plan simply by reason of transfer, but such employee was allowed vesting credit under the Plan for service to the affiliate, which enabled continued vesting of benefits accruing while he was a participant. Furthermore, such employee became a participant in the affiliate's plan and vesting of benefits accruing thereunder was based on all service with members of Halliburton's controlled group. Moreover, there is no indication that the transfers were related to the events causing the decrease in plan participation. Accordingly, we will exclude such transferees from the affected class.

5. Separated Participants Subsequently Hired Back

Between 1987 and 1989, 1,124 participants who had been involuntarily separated from service in 1986 were hired back by Halliburton and recommenced participation in the Plan. [13] Halliburton argues that the rehired participants should not be considered "affected

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[13] A total of 1,279 employees were hired back during such period. Eighty had elected early retirement, 1 had retired at or over normal retirement age, 67 had voluntarily resigned, and 7 had been terminated for cause. Since employees in such categories have been excluded from the partial termination calculation, it is inappropriate to count them in arriving at the proper number of affected employees. Only employees who would otherwise have been counted should bededucted from the total as rehired employees in order to avoid excluding the same employees twice. Because fully vested, partially vested and zero balance participants are counted, hirebacks in such categories are taken into account.

employees" because they were only temporarily laid off, and forfeited amounts were available for restoration to the accounts of partially vested participants upon reemployment. Respondent argues that such employees should be included in the affected class because only the events of 1986 are relevant to the issue presented here and permitting the number of affected employees to be adjusted by the number of rehires would prolong and complicate the process of ascertaining whether a partial termination hadoccurred. [14] We do not

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[14] Respondent's argument is contradicted somewhat by the Plan TerminationHandbook, which instructs respondent's agents to consider "the extent to whichterminated employees are replaced" in determining whether a partial terminationhas occurred. Plan Termination Handbook, 4 Administration, Internal

agree that we should limit ourselves to considering the events of only 1 plan year in resolving the partial termination issue, as the events bearing on such issue may extend over more than one such year. In re Gulf Pension Litigation, 764 F. Supp. at 1167.

Halliburton further argues that the partial termination rule contemplates apermanent, rather than a temporary, reduction in plan participation, citing In re Gulf Pension Litigation, supra at 1163, and accordingly concludes that employees who are only temporarily absent from their jobs should not be counted in the partial

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Revenue Manual (CCH), sec. 252(6), at 21,151. Of course, respondent is not bound by statements in the Internal Revenue Manual. Capitol Federal Savings T.C. No. 15; 16 E.B.C. 1929 Loan v. Commissioner, 96 T.C. 204, 216-217 (1991), and cases cited therein.

termination calculation. Halliburton also notes that such rehires either had their forfeitures restored or were given the opportunity to obtain restoration upon rejoining the Plan, and so were in the same position with respect to their accrued benefits as they were when they originally left the Plan. Halliburton notes that various courts have suggested that temporary reductions in plan contributions and participation might not constitute terminations; however, no court has yet explored the issue in any detail. Indeed, in Tipton & Kalmbach, we specifically reserved ruling on theissue of whether a temporary work force reduction could cause a partialtermination under the facts and circumstances test. Tipton & Kalmbach,Inc. v. Commissioner, 83 T.C. at 162 n.9.

After due consideration, we agree

with Halliburton that the terminated participants who were rehired should not be considered in deciding whether a partial termination occurred. We cannot, as respondent argues, treat suchcircumstance as irrelevant. The regulations direct that all facts and circumstances must be considered, and, to the extent such information is in the record, we cannot simply ignore it. Moreover, a temporary workforce reduction does not appear to fit within the concept of the partial termination, and other courts have suggested as much. For instance, in Collignon v. Reporting Services Co., 796 F. Supp. at 1141, the court described partial termination of a plan as "An employer-initiated permanent reduction of a significant percentage of employees * * * as part of a major corporate event" (emphasis supplied).

Moreover, where a suspension of contributions to a plan isundertaken as a temporary measure in response to unfavorable business and economic conditions, such suspension is not considered indicative of a termination of a plan. Babb v. Olney Paint Co., 764 F.2d 240, 243 (4thCir. 1985)

Holding that a large drop in plan participation, no matter how short induration, could cause a partial termination would greatly and unnecessarily complicate the administration of plans and would needlessly discourage their establishment. There are occasions in the ordinary course of business when an employer must temporarily lay off workers, where such layoffs do not portend any substantial change in the business' structure or scope of activity. Forinstance, a layoff may

occur while a factory is retooled to produce a new product, or a plant may be forced to shut down if a strike or natural disaster elsewhere temporarily interrupts the supply of parts or raw materials needed to maintain production. In such instances, the employees are usually rehired within a relatively short time, and treating the plan as partially terminated due to the temporary dip in participation caused by such workinterruptions makes no sense. The oil price collapse and resulting reduction in demand for Halliburton's services, which caused the drop in Plan participation in the instant case, constituted a similar temporary business dislocation. We do not accept respondent's argument that we should define a "temporary" layoff by reference to the standard employed under section 162 for deciding whether expenses

incurred when a worker is temporarily away from home are deductible. Nonetheless, respondent raises valid concerns that must be addressed indeciding the extent to which rehiring shall be taken into account. Respondent's primary concern is that taking rehiring into consideration will complicate and delay the process of ruling on partial termination issues. Respondent notes that a worker may be rehired up to five years after termination and still be eligible for restoration of his forfeited account balance. Sec. 411(a)(6)(D). However, the longer the interval between the rehiring and the event allegedly causing a partial termination, the less probative such rehiring is with respect to such issue. If a drop in workforce is truly temporary, the bulk of the rehiring should occur within a relatively short time after the

initial drop in participation. As time goes by, the likelihood of rehiring terminated participants declines significantly as they find new jobs or otherwise leave the labor pool available to the employer. In the instant case, the majority of therehiring occurred in 1987, while much smaller numbers were hired back in 1988 and 1989, indicating that such workers were only temporarily discharged.

Employers who reduce their workforce due to adverse economic conditions must also distinguish their situations from that presented in Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984), by rehiring terminated participants in a relatively rapid manner. In Tipton, the workforce reduction was permanent, and participation levels did not recover in the years followingsuch reduction. Id. at 162. In Tipton, a permanent downsizing

orrestructuring in response to adverse business conditions occurred, suggesting that a partial termination of a plan had taken place.

The instant case is distinguishable from Tipton because staffing levels began to recover almost immediately after the layoffs. Toward the end of 1986, the price of oil was increasing because oil producers decided to return to a fixed price system. The number of operating rigs also began to rise with the price of oil. Consequently, Halliburton put substantial numbers of the laid offemployees back on its payroll in the years immediately following 1986. Accordingly, in the instant case, the rehired participants should not be included in the class of affected employees for purposes of the percentage test.

We note further that, even if we were to include the rehired participants inthe class of affected employees, we find it appropriate to consider the fact ofsuch rehiring in deciding whether such reduction is significant, among all circumstances to be considered. Sec. 1.411(d)- 2(b)(1), Income Tax Regs. Such rehiring is relevant to deciding whether such reduction was temporary or permanent in nature. The rehiring of a substantial number of terminated participants within a short time after the layoffs suggests that such layoffs were a temporary response to transient economic conditions, and a reduction in participation under such circumstances is not indicative of a partial termination of the plan, especially where forfeited amounts were restored to partially vested participants upon reemployment.

In summary, we hold that for purposes of deciding whether a partialtermination has occurred, the only participants to be considered are those who are permanently excluded from the Plan due to employer-initiated severances which are prompted by the circumstance or event causing the contraction of the Plan.

Calculation of the Denominator of the Significant Percentage Fraction

Generally, the denominator of the significant percentage fraction is the number of plan participants at the beginning of the plan year in which the partial termination is alleged to have occurred plus the number of participants added during such year. Tipton & Kalmbach, Inc. v. Commissioner, supraat 156. In the instant case, there were 19,017 participants in the HalliburtonPlan on January 1, 1986, and 581 new

participants were added in 1986, for a total of 19,598.

Respondent, however, argues that the transferred IMCO Division employees should be excluded from the denominator of the significant percentage fraction, arguing that fully vested participants who remained in employment, even with another employer, should be excluded from both numerator and denominator in order to avoid distortion of the significant percentage fraction. We do not agree. The transferred employees were participants in the Plan at the beginning of the plan year in question, which has generally been accepted as a starting point for calculating the denominator. See id.; In re Gulf Pension Litigation,

764 F. Supp. at 1168. [15] Consequently, the transferred employees who were participants in the Plan at the beginning of the Plan year would ordinarily be included in the denominator, regardless of how their circumstances changed during the year. At the beginning of 1986, the IMCO Division employees were indistinguishable from other plan participants. Some were fully vested andothers partially vested in their accrued benefits. Consequently, in measuring the decline in workforce size for purposes of deciding whether a partial termination has occurred, including them is proper.

Furthermore, the cases that have

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[15] While a general counsel memorandum is not precedential, Biddle v. Commissioner, 302 U.S. 573, 582 (1938), we note that G.C.M. 39,344 (Oct. 16,1984), reaches the same conclusion.

dealt with transferred employees in thecontext of partial terminations have not excluded such employees from thedenominator, even though they were not counted in the numerator. In re Gulf Pension Litigation, 764 F. Supp. 1149 (S.D. Tex. 1991); Morales v.Pan American Life Insurance Co., 718 F. Supp. at 1302. Respondent's argument that "distortion" may occur if the IMCO transferees are included is vague, and we do not perceive any distortion by including such transferees. Moreover, respondent does not argue that all fully vested participants should be excludedfrom the denominator, as was done In re Gulf Pension Litigation, supraat 1165 n.10, and so we do not consider whether the transferees should be excluded on such ground. Accordingly, we do not exclude the IMCO transferees from the denominator.

Thus, the denominator of the significant percentagefraction is 19,598.

Whether Percentage of Plan Participants Terminated Is Significant

Synthesizing the foregoing analysis, we hold that at most 3,891 participants who ceased participating in the Halliburton Plan in 1986 should be counted for purposes of the significant percentage test. While we have included fully vested and zero balance participants in our calculation, we do so simply for illustrative purposes and do not decide whether such participants should be excluded or included, as such issue will not affect the outcome of the instantcase. Such figure is calculated as follows:

| Involuntarily separated participants | |
|---|---|
| Fully vested | 224 |
| Partially vested | 4,560 |
| Zero balance accounts | 231 |

| | |
|---|---|
| | 5,015 |
| Less: | |
| Rehired involuntarily separated participants | |
| Fully vested | 45 |
| Partially vested | 1,039 |
| Zero balance accounts | 40 |
| | (1,124) |
| Net reduction in participation: | 3,891 |

For purposes of the significant percentage test, such figure serves as the numerator of the fraction, of which the denominator is 19,598, comprising all participants in the Halliburton Plan on January 1, 1986, plus participants entering the plan in such year. The resulting percentage is 19.85. [16]

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[16] Counting only partially vested involuntary terminees produces a reductionpercentage of 17.97 percent, calculated as

No egregious circumstances exist which would justify concluding that a percentage of less than the 20-percent rule of thumb is significant. Rather, it is clear that the layoffs were an emergency response to a temporary collapse in demand for Halliburton's oil field services due to a drop in the price of oil. As drilling and production activity recovered, Halliburton rehired many laid off participants, enabling them to regain amounts subject to forfeiture when they were laid off in 1986. Consequently, the 19.85-percent reduction is not sufficiently large to be significant.

We accordingly conclude, based on the entire record, that a partial termination of the Halliburton Plan did not occur in 1986. Accordingly, the forfeitures

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follows: (4,560-1,039)/19,598.

arising out of the reduction in plan participation are to be allocated among continuing participants as provided under the Plan. The parties appear to have agreed that if we find that no partial termination of the Plan occurred, the Plan and the IMCO Plan are qualified under section 401(a). To reflect the foregoing,

Decision will be entered for petitioner in docket No. 26290-90R. An appropriate decision will be entered in docket No. 2397-91R.

District Director Gary O. Booth

September 7, 1988

Halliburton Profit Sharing Plan

FACTS:

Halliburton Company of Dallas, Texas adopted a profit sharing and savings plan for its employees on January 1, 1944. The plans has since been amended seven times and received several favorable determination letters. The plan received its last favorable determination letter on January 16, 1986.

By letter dated April 27, 1987, Halliburton Company ("Halliburton") filed with the Dallas Key District of the Internal Revenue Service an application for a determination that the Halliburton Profit Sharing and Savings Plan (the "Plan") (plan No. 001) as amended by the First and Second Amendments thereto, and the related trusts, continue to meet the

requirements of Section 401(a) and Section 401(k) of the Internal Revenue Code of 1986, as amended,(the "Code"). Further, Halliburton requested a determination that there had not been a partial termination of the Plan in 1986.

Halliburton, together with the other members of its controlled group of corporation (the "Halliburton Controlled Group"), one of the world's larger and more diversified oil field services and engineering/construction organizations. The Halliburton Controlled Group, both domestic and international, may be generally divided into three principal categories of operation: oil field services and products: industrial engineering/construction services; and marine engineering/construction services. Also, the Halliburton Controlled Group engages in writing multi-line property and

casualty insurance through Life Insurance Company of the Southwest, and provides health care cost containment and claims administration services through Health Economics Corporation. Substantially all of the oil field services and products business and a significant portion of engineering/construction services are related to the petroleum industry. Approximately three-fourths of the consolidated net revenues (not including insurance services) of the Halliburton Controlled Group are derived from services to, including construction for, the petroleum industry. Generally, thirty percent of revenues come from international sales and services.

The oil field services and products component of the Halliburton Controlled Group is a major provider of products and services, both on shore and offshore, to

the exploration and production segments of the petroleum industry. The industrial engineering/construction services component provides design, construction, and contract maintenance services for the petroleum industry, public utilities, general industry and government. The marine engineering/construction services component performs services predominately for the petroleum industry, including the design, fabrication and installation of offshore structures, facilities and pipelines on a world wide scale.

The oil field services component includes several operating divisions of Halliburton as well as the operating subsidiaries of Otis Engineering Corporation, and Jet Research Center, Inc. Likewise, the engineering and construction services component includes Brown and Root. Finally, insurance subsidiaries

which include Life Insurance Company of the Southwest and Highlands Insurance Group also maintain retirement plans.

The various corporations in each of these components maintain several retirement plans, which, in the aggregate cover a significant number of the employees in the Halliburton Controlled Group. For the most part, the plans are defined contribution plans of the profit sharing type. There are also, however, a few small defined benefit pension plans which are being funded to operate on an actuarially sound basis.

The Plan covered about 19,334 (includes IMCO employees) as of January 1, 1986, and all of the retirement plans maintained by other members of the Halliburton Controlled Group covered 32,844 employees as of January 1, 1986.

The Plan provides that employees will be fully vested in their account balance upon death, retirement, disability or termination of employment after attaining age 50 or completing 15 years of credited service. Should an employee terminate employment for reasons other than disability, death or retirement, and prior to becoming 100% fully vested in his account balance, the Plan provides that he will forfeit, no later than the time that his termination of employment results in a five year break-in-service, that part of the account balance to which he is not entitled. See Plan section 10.04(a). Effective as of January 1, 1987 (for termination of employment after that date), such forfeitures occur at the time of a cash-out distribution if such distribution is earlier than the date on which a five year break-in-service occurs.

In all events, however, the forfeiture will occur no later than the date on which a five year break-in-service occurs. For termination of employment prior to January 1, 1987, however, forfeitures could also occur earlier than the date of five year break-in-service. Such forfeitures occurred as of the later of a one year break-in-service or a cash-out distribution. In no event, however, would a forfeiture be delayed until after a five year break-in-service. Although the Plan provided (prior to January 1, 1987) that a termination of employment by reason of a reduction in force would, upon the participant's election, permit the payment of benefits as soon as practicable after the date that such participant terminates employment, forfeiture with respect to reductions in force occurred as of the day on which a one year break-in-service

occurs. In all events, amounts attributable to employees who terminated employment in 1986 generally are not forfeited until sometime in 1987 and are thus allocable as "termination surplus" as of December 31, 1987.

For several years, worldwide oil and gas production, in excess of existing demand, along with the absence of major industrial expansion in the United States, and the resulting decline in crude oil prices have together operated to depress the markets of the energy-related components of Halliburton. the American Petroleum Institute's data show a decline in production during 1986 of about 700,000 barrels per day. At 8.43 million barrels a day, the United States production rate was the lowest that it has been since 1977, when the dependence on imports reached an all-time high of 48%.

A total of 7,110 participants left the Plan during 1986 for the following reasons:

| | | | |
|---|---|---|---|
| (1) | Deaths | | 32 |
| | Retirees: | | |
| (2) | Normal | 22 | |
| (3) | Early | 1,200 | |
| | Total Retirees | | 1,222 |
| | 100% Vested | | |
| (4) | Voluntarily terminated | 37 | |
| (5) | Termination for cause | 18 | |
| (6) | Lay-offs (Involuntary) | 294 | |
| | 100% Vested Terminations | | 349 |
| | Unvested: | | |
| (7) | Voluntarily termination | 694 | |
| (8) | Termination for cause | 228 | |
| (9) | Lay-offs (Involuntary) | 4,578 | |
| | Unvested Terminations | | 5,500 |
| (10) | Transfers to Affiliates | | 7 |
| | Total Reduction in Participants | | 7,110 |

The above data does not include 844 employees (as of January 1, 1986) of the former IMCO Service division.

Late in 1986, Halliburton combined its IMCO Service Division into a joint venture with Magcobar, a division of Dresser Industries, Inc. This combination resulted in a more efficient and economically viable drill fluids business than either partner could develop alone. The new company, M-I Drilling Fluids, Co., has a very strong market position as a result of the joint venture.

M-I Drilling Fluids Co. is owned 60% by Dresser and 40% by Halliburton. Employees of the IMCO Division who were participants in the Plan were transferred to and became participants in a new plan established by M-I Drilling Fluids Co. This plan is a profit sharing plan with a cash-or-deferred thrift feature which

provides employer matching contributions for a portion of the employee's elective deferral contributions.

The accounts in the Plan for IMCO employees were spun off and the matching trust assets were transferred to the new IMCO plan and trust maintained by Halliburton for their benefit. The IMCO plan contains only former employees of Halliburton and is not the plan mentioned above sponsored by M-I Drilling Fluids Co.

The IMCO plan was then frozen and all accounts were 100% fully vested and nonforfeitable as of the spin-off. The IMCO Plan continues to share in the investment earning of Halliburton's master trusts, which has been better than thee employees would likely enjoy under the smaller investment portfolio in the new plan established by M-I Drilling Fluids. Halliburton made a business decision to

fully vest all IMCO participants who were employees in the IMCO Division because they would be transferring to M-I Drilling Fluids and Halliburton desired that their account balances in the IMCO Plan be preserved for their retirement.

On December 22, 1986, 717 employees (including over 400 Plan participants) transferred to M-I Drilling Fluids Co. These employees participated in the new M-I Drilling Fluids Co. These employees participated in the new M-I Drilling Fluids plan and the participants also retained their fully vested account balances with the IMCO Plan.

Section 16.05 of the Plan provides that upon a partial termination of the plan, the rights of each participant and beneficiary affected by such partial termination to the amounts credited to his account shall be fully vested as of the

date of such partial termination.

ISSUE:

(1) Whether all affected employees have a nonforfeitable right to their account balance as required by IRC 411(d)(3) because the plan was partially terminated for the plan year ending December 31, 1986.

(2) For the purpose of determining whether the plan was partially terminated for the plan year ending December 31, 1986, which of the employees who were excluded from participating in the plan, were excluded due to an employer initiated action and are affected employees.

LAW:

Internal Revenue Code (Code) section 411(d)(3) provides that a trust shall not constitute a qualified trust under section

401(a) unless the plan of which such trust is a part provide that upon its partial termination, the rights of all affected employees to the amounts credited to the employees' account are nonforfeitable.

Income Tax Regulations (Regs) section 1.411(d)-7(a) provides that a plan is not a qualified plan (and a trust forming a part or such plan is not a qualified trust) unless the plan provides that upon the partial termination of the plan, the rights of each affected employee to amounts credited to his account at such time are nonforfeitable.

Regs section 1.411(d)-2(b) provides that whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all facts and circumstances. Such facts and circumstances include: the exclusion, by

reason or a plan amendment or severance by the employer, of a group of employees who have been previously covered by the plan.

Regs section 1.411(d)-2(b)(3) provides that if a termination of a qualified plan occurs, the provisions of Code section 411(d)(3) apply only to the part of the plan that is terminated.

In Warren Weil and Maria Galuppo V. Retirement Plan Administrative Committee for the Terson Company, Inc., 750 F2d 10, it was held that a reduction of 27% of the plan's active participants may have been a partial termination.

Revenue Rule (Rev. Rul.) 72-510, 1972-2 C.B. 223 and Rev. Rul. 73-284, 1973-2 C.B. 137 provide that a significant number of employees who have been covered under the employer's pension plan and were discharged in connection with the winding up of part of the employer's business

constitutes a partial termination.

Rev. Rul 73-284 provide that 12 of the 15 participants who were discharged upon refusing the opportunity to transfer to the employer's new business location was a partial termination.

TAXPAYER POSITION:

In determining whether a partial termination occurred and in determining which of the dropped participants should be excluded form the computation, Halliburton believes that the following should be the starting point.

| | | | |
|---|---|---|---|
| (1) | Deaths | | 32 |
| | Retirees: | | |
| (2) | Normal | 22 | |
| (3) | Early | 1,200 | |
| | Total Retirees | | 1,222 |
| | 100% Vested | | |
| (4) | Voluntarily terminated | | 37 |

| | | |
|---|---|---|
| (5) | Termination for cause | 18 |
| (6) | Lay-offs (Involuntary) | 294 |
| | 100% Vested Terminations | 349 |
| | Unvested: | |
| (7) | Voluntarily termination | 694 |
| (8) | Termination for cause | 228 |
| (9) | Lay-offs (Involuntary) | 4,578 |
| | Unvested Terminations | 5,500 |
| (10) | Transfers to Affiliates | 7 |
| | Total Reduction in Participants | 7,110 |

The gross reduction in participants during the 1986 Plan Year can be calculated as follows:

$$\frac{\text{Total Reduction During the Plan Year}}{\text{Total Plan Participants Beginning of Year Plus Additions During Year}} = \frac{7,110}{(18,490+414)}$$

The gross reduction in participants

calculated using this formula produces a thirty-seven and sixty-one one-hundredths percent (37.61%) reduction in Plan participants.

This data does not include 844 employees (as of January 1, 1986) of the former IMCO Services Division who were participants in the Plan.

The taxpayer states that in determining whether a significant percentage of participants have left the Plan during a Plan Year for purposes for finding a partial termination, certain groups of participants are not included in calculating the percentage.

IMCO DIVISION EMPLOYEES:

IMCO employees should not be included in the partial termination data. They were fully vested in their account balance in the Plan and are covered under a

successor plan sponsored by M-I Drilling Fluids Co. However, even if IMCO employees are included, employees transferred to the IMCO Plan should not be counted in determining the total reduction. Rev. Rul. 72-439, 1972-2 C.B. 223. The transfer of assets and liabilities from the Plan to the separate IMCO Plan for employees of the IMCO Division was made in penetration for the joint venture with Dresser Industries, in which Halliburton is a 40% owner and Dresser is a 60% owner. The separate plan was frozen and the employees were 100% vested. The employees of the joint venture now receive a profit sharing contribution under a new plan equal to 3% of compensation of compensation with a possible 3% discretionary employer contribution, in addition. The new plan also contains a cash or deferred feature

and 100% vesting occurs over 7 years. Because the IMCO employees are covered under the new IMCO plan, they should not be included in determining whether the Plan had a partial termination in 1986.

The transfer of assets and liabilities to the IMCO Plan should not cause the Plan to have to account for the IMCO employees when determining whether or not the Plan is to be treated as partially terminated. Section 414(l) of the Code permits asset transfers and spin-offs of plans without requiring an accounting by the transferor plan for the terminations of the spun off plan's participants.

Further, the IMCO employees, by reason of receiving fully vested accounts under Plan, received the entire protection they were entitled to receive and should not be included in determining whether the Plan had suffered a partial termination in

1986. See, e.g. Internal Revenue Manual: Babb, 764 F.2d 240. To require IMCO employees to be counted when testing whether the Halliburton Plan has incurred a partial termination distorts the intent of section 414(l) of the Code and partial termination rules.

Even if IMCO employees who severed employment should properly be accounted for in determining whether there has been a partial termination, IMCO employees who did not terminate as a result of employer-initiated action (i.e., IMCO employees who would be included in the categories discussed above) should be excluded from the reduction in plan participants.

Finally, requiring employees covered by another plan maintained by the employer or a member of the controlled group of employers to be included in the partial termination computation should not be done

without taking into account all plans of the controlled group. Inclusion of all plans of the Halliburton Controlled Group results in even lower reduction percentages. If all of the plans of the controlled group of employers of which Halliburton is a member are considered, the 37.61% gross reduction calculated above becomes only 31.08%. Halliburton contends that IMCO is not properly included unless it is permitted to include all plans of the controlled group.

DEATHS:

Clearly participants who died are properly excluded since no employer-initiated action is involved.

RETIREES:

Participants terminating as a result of normal and early retirements are also

properly excluded from the calculation since no employer-initiated action is involved in a voluntary election to retire. See Weil v. Retirement Plan Administrative Committee for the Terson Company, Inc., 750 F.2d 10 (2nd Cir. 1984): Babb v. Olney Paint Co., 764 F.2d 240 (4th Cir. 1985); Wishner v. St. Luke's Hospital Center, 550 F. Supp. 1016 (S.D.N.Y. 1982); GCM 39344.

Under the Plan, participants are permitted to take early retirement after attaining age 55. However, during 1986, Halliburton offered several early retirement "windows" for employees ages 50-54 who were otherwise not eligible for retirement. It is clear that retirees who were age 55 or over and thus were eligible for retirement under the regular Plan provisions should be excluded from the calculation. Further it is Halliburton's

contention that early retirees ages 50-54 should also be excluded because their termination did not result from employer-initiated action. Offering an early retirement window is not the type of employer-initiated action contemplated by the partial termination rules. The Internal Revenue Manual, Plan Termination Handbook 252, 4 Internal Revenue Manual-Administration, Page 21, 147-48 (CCH) ("Internal Revenue Manual") and IRS Document 6678 (4-81), Plan Termination Standards (Explanation for Worksheet Form 6677) ("Document 6678"), give as examples of employer-initiated action, "elimination of a division, a plant closing, the discontinuance of a particular product..." Document 6678, page 2.

Retirements resulting from a company's offer to employees of the right to make a purely voluntary election to

retire early cannot be said to be an employer-initiated termination absent other compelling facts. The Employee Plans Specialist has suggested that, if employees offered a voluntary election to retire early knew that they would likely be terminated in any event, their election of early retirement would not be truly voluntary and thus could be said to be employer-initiated. While such an assertion might have merit where electing early retirement offered economic gain to the employee such as becoming fully vested, such is not true here since under the Plan all participants vest at age 50. Furthermore, in many cases, the employees who elected early retirement were not faced with the loss of their employees who elected early retirement. Rather it was generally younger employees with fewer years of service with Halliburton who

would have been laid off if these participants had not voluntarily elected early retirement.

In addition, employees electing early retirement are not treated as well in some respects as employees who are laid off. Employees who were laid off pursuant to the reduction in force received two weeks severance pay provided they had 3 years of service. Early retirees received no severance pay. Election of early retirement was an economic disadvantage from this standpoint.

Even if the early retirees are deemed to have terminated as a result of employer-initiated action, these participants should not be included in determining whether a partial termination occurred because they were fully vested upon termination. See, e.g., Babb, 764 F2d 240; Internal Revenue Manual. See the

discussion under IMCO Division employees.

Voluntary Terminations

Participants who voluntarily elect to terminate employment cannot be said to have terminated as a result of employer-initiated action. Only participants involuntarily terminated should be included in calculating the percentage of participants excluded from the plan. In G.C.M. 39344, the Service stated that "employee-participants do not need protection from any possible employer abuses if the reason retirement benefits are forfeited is the result of voluntary employee behavior that did not occur as a result of employer-initiated action." The Service also conceded that participants who voluntarily terminated employment are not included in the partial termination

determination in Hungerford Harvestore, Inc. vs. Comm'r, T.C. Okt. 25306-84R (filed July 13, 1984); Kreis vs. Charles O. Townley, M.D. & Associated, P.C., 833 F2d 74 (6th Cir. 1987). These authorities offer ample support for excluding voluntary terminations from the partial termination calculation.

Halliburton's personnel records reflect that reasons other than the employee's expectation of termination were the basis of voluntary terminations of employment with respect to substantially all of the 772 persons (including IMCO employees) who voluntarily terminated employment in 1986 (including 731 persons who were not vested upon termination). Specifically, 441 persons terminated because they found other employment, 119 terminated because of personal reasons, 19 were dissatisfied with the hours of

employment, 4 were dissatisfied with conditions and gave no notice, 23 gave no reason (6 of these gave no notice), 1 would not accept criticism of supervisor, 56 wanted to move to other locations where there was no available employment with Halliburton, 36 terminated employment in order to return to school, 3 resigned because of marital problems, 1 did not want to adjust to working conditions, 17 were dissatisfied with their pay rate, 7 refused to transfer at Halliburton's request, 2 were unable to perform their jobs, 8 left to become self-employed, and 24 gave other reasons. No one gave anticipated discharge or layoff as the reason for termination.

Therefore, since the 772 voluntary terminations were not the result of employer-initiated action of the type contemplated by the partial termination

rule, these employees should not be included in the partial termination calculation.

Fully Vested Employees

Employees who are laid off, but who are fully vested under the Plan are not employees affected by a partial termination. Terminations of 100% vested employees should not be counted in determining if a partial plan termination occurs. See Babb, 764 F2d 240. The Internal Revenue Manual indicates that its personnel should examine reductions in participants who terminate when not fully vested. It omits any reference to inclusion of fully vested participants. Exclusion of vested participants is also consistent with the underlying policies of preventing discrimination in favor of the

prohibited group of employees and potential reversion to the employer on termination of the Plan. The case law and the Internal Revenue Manual should be adequate authority to disregard terminated participants who are 100% vested and who thus have received the full measure of protection to be provided under the partial termination rules.

Terminations for Cause

If a participant's own improper actions cause him to leave the employer's service, he should not be counted in the partial termination calculation because his termination of employment is wholly unrelated to any reduction in force and thus to any possible partial termination. Participants terminated for cause should therefore be excluded from the

calculation. The IRS recently settled a partial termination case by permitting the exclusion of terminations for cause (thefts and sexual harassment). R. Perry Cable T.V. Corp. vs. Comm'r, T.C. Dkt. 5783-84R (filed 3-7-84).

In addition to the employee groups referenced above who should not be considered as terminated because of employer-initiated action, other groups of employees should not be counted when calculating whether a significant reduction in the percentage of employees has occurred which could result in a partial termination. These groups include the following:

Rehires

Rehires should also be excluded from total reductions. Rehired employees

generally are credited with full past service for vesting under the Plan. Further, rehires suffer no loss of benefits under the Plan as a result of termination. If the rehired employee received a distribution from the Plan resulting in the forfeiture of benefits, the employee has the right to buy-back into the plan by re-paying the amount of the distribution. Upon repayment the amount of the employee's accrued benefit which was forfeited will be fully restored. The accrued benefits of employees who did not receive a distribution prior to rehire were not forfeited and are still intact or, if this account was totally forfeitable, will be restored upon rehire. Since rehired employees suffered no loss of benefits under the Plan and continue to accrue vesting service, there is no reason to

treat them any differently from any other active employee, therefore they should not be included in the partial termination calculation.

In addition, a majority of the Plan's terminations (lay-offs of 4,872 employees or 68.52% of total reductions) were caused by the adverse economic conditions in the oil industry rather than employer-initiated plant or location shut-downs. At the time of the lay-offs, Halliburton expected to rehire many of the laid off employees when the economy improved and in fact has already done so. Through December 31, 1987, there have been 767 rehires. This mitigating factor should be considered when analyzing the partial termination issue. The growing number of rehires also supports the conclusion that no partial termination of the Plan occurred and the requisite employer-

initiated action is not present. The partial termination rules contemplate a permanent reduction in plan participation, rather than a temporary reduction followed by a rehire of many of the excluded participants. See Babb, 764 F2d 240.

It is not consistent with the purpose of the Code and regulations dealing with partial termination of employee benefit plans to treat those persons who cease being participants in that plan, and who are then rehired with the opportunity to have their account balance fully restored upon repayment of their cash out distribution, as causing a partial termination of the plan or as being "affected participants" who must be fully vested if there has been a partial termination of the plan. If such a person is reemployed before incurring a five year break-in-service (as 767 former

participants in the plan were, as of December 31, 1987) then they may buy back into the plan and have their forfeited account balance restored during the five year period beginning on the date of their rehire (over 35 have already done so) if they received a cash out distribution. If they had forfeited their entire account balance, it is automatically restored upon the date of their reemployment.

If persons who were laid off in 1986 are rehired before a five year break-in-service and they are deemed to be part of the reason that a partial termination of the plan occurs and they are deemed to be affected participants, then they are either recipients of a windfall or treated differently from others who are similarly situated. If they are affected participants, then they are required to be fully vested upon partial plan

termination. If the are rehired during the period prior to a five year break-in-service, they have a right under the plan to buy back and receive restoration of their accounts balance. If they are fully vested because of a partial termination, however, the buy back rules have lost much of their vitality. On the other hand, future contributions will not be fully vested and the Plan will have to establish two accounts for such participants because of their being declared as "affected participants." Should they have returned to service prior to the time that the Internal Revenue Service determines that a partial termination of the Plan has occurred, the participants should not be counted in determining whether a reduction in Plan participation has caused a partial termination of the Plan. To do so would have the effect of counting rehires

(especially those who have made a buy back) as part of the cause for a partial termination but not counting them as "affected participants entitled to fully vesting" since they can, or already have, repaid their distribution and received a full restoration of their account balance under the cash-out buy-back rules.) Such a treatment of rehires would result in them being part of the participant group causing a partial termination of the plan but not benefiting from the partial termination of the plan by being fully vested. In addition, they would be penalized as a Plan participant by not sharing in an allocation of forfeitures (because there are no forfeitures for them to share since there has been a full vesting of terminated participants because of a partial termination of the plan).

Transfer to Affiliates

Employees transferred to affiliates of Halliburton should not be included in the partial termination calculation. Although they move at the employer's request, they have not terminated employment with the Halliburton Controlled Group. These employees receive vesting service credit under the Plan for their service with the affiliate and thus can continue to vest in their unvested accrued benefit after their transfer. In addition, transferred employees become participants in the plan maintained by the affiliate company for its employees. Such employees are credited with vesting service under the affiliate's plan for their entire period of service with any Halliburton controlled group member. Since these participants are covered under the plan of

the affiliate they should not be included int he partial termination calculation. See Rev. Rul. 72-439, 1972-2 C.B. 223.

The percentage reduction calculated in accordance with the foregoing analysis (not including IMCO employees) is as follows:

| | | |
|---|---|---|
| Total reduction | | 7,110 |
| Less: | | |
| (1) Deaths | 32 | |
| (2) Retirees | 1,222 | |
| (3) Voluntary Term. unvested | 694 | |
| (4) Total Term. 100% vested | 349 | |
| (5) Termination for cause-unvested | 228 | |
| (6) Rehires (through 12/31/87) | 767 | |
| (7) Transfers to Affil. | 7 | |
| Total Exclusions | | (3,299) |

| | | |
|---|---|---|
| Reduction in participants | | 3,811 |
| Reduction in Participants During the Plan Year | = | 3,811 |
| Total Plan Participants at the Beginning Plus Additions During the Year | | (18,490+414) |
| | = | 20.16% |

It is the Halliburton position that give the absence of any possibility or discrimination or reversion or other compelling facts, the above calculation does not warrant a partial termination.

It is also Halliburton's position that, regardless of the percentage reduction in participants under the Plan, a finding of a partial termination under the present facts serves no policy underlying the partial termination rules. The historical development of the rule requiring full vesting upon partial

termination demonstrates that there are two policies for the partial termination rule.

First, the rule is designed to prevent discrimination in favor of highly compensated employees. Mimeograph 6136, 1947-1 C.B. 58, superseded by Rev. Rul. 69-24, 1969-1 C.B. 110 (restating the law under the 1954 Code). This type of discrimination could arise, for example, where employees other than the highly compensated employees ere terminated from employment resulting in a forfeiture of their unvested benefits which were then reallocated to the highly compensated employees still covered by the plan. See, e.g., Ryan School Retirement Trust vs. Commissioner, 24 T.C. 127 (1955), acq. 1955-2 C.B. 9.

The other purpose for which the partial termination rule was developed is

to prevent direct or indirect reversions of assets in pension plans to employers. See P.S. 22, 1944 P-H paragraph 66-365, superseded by Rev. Rul. 68-302, 1968-1 C.B. 163. See also Bruch vs. Firestone Tire & Rubber Co., 828 F2d 134 (3rd Cir. 1987). Absent the partial termination rule, an employer could benefit directly or indirectly from forfeitures of terminated employees by terminating a plan and receiving a direct reversion or by using the forfeitures in defined benefit or money purchase pension plans to reduce employer contributions thus receiving an indirect reversion from a plan.

There is, however, no indication that the partial termination rule evolved historically for the purpose of protecting the rights of terminating employees. This conclusion is bolstered by the fact that the Code and ERISA provide other means for

protection of employees's benefits upon termination of employment. Section 510 of ERISA makes it illegal for an employer to terminate participants from vesting in their accrued benefits.

In addition, the enactment of ERISA added, in Code Section 411 and ERISA Section 203, the requirement that participants' benefits vest according to one of the vesting schedules set out therein. The Tax Reform Act of 1986 shortened the vesting schedules even further. Beginning in 1989, participants must be fully vested, if not earlier, after 7 years of service.

Finally, participants are protected from forfeiture of benefits under the five year break-in-service rules enacted by the Retirement Equity Act of 1984. These rules prevent any forfeiture of a participants's benefits prior to a five year break-in-service unless the participant receives a

cash-out distribution and a right to buy back into the plan upon rehire.

Neither the policy of preventing discrimination not of preventing a reversion to the employer is served by finding a partial termination in this case. Under the present facts, there is no possibility of discrimination as a result of the 1986 participant reduction. Forfeitures attributable to terminating participants are reallocated to all remaining active participants in the Plan on the basis of compensation to the extent that such reallocations will not cause the limits of Code section 415 to be exceeded. The Code section 415 limits on annual additions to a participant's accounts under a defined contribution plan mean that non-highly compensated employees in the Plan will receive a larger proportionate share of the forfeitures

which are to be reallocated for the 1986 Plan Year (absent a partial termination) than will many highly compensated employees. Forfeitures which cannot be reallocated to highly compensated employees because of the Code section 415 limits will be used to reduce Halliburton's profit sharing contributions to the Plan. The Plan will be amended to achieve this result and such amendment will be premised on the payment of a current, cash bonus equal to the reduction in the contribution to the Plan. The bonus will be divided among those employees who are deprived of an allocation by reason Code section 415.

Furthermore, the sheer number of participants covered by the Plan who will receive forfeiture allocation assures that no discrimination will result. This in not a plan in which the only participants

still in the plan and eligible to receive forfeiture allocations are highly compensated employees. Forfeitures under the Plan are reallocated on the basis on Plan compensation and many highly compensated employees will not receive their full share of forfeitures because of the Code section 415 limits. As a result there is no possibility that discrimination in favor of the highly compensated employees will result.

It is also clear that there is no increase in the possibility of a reversion to the employer. Under a defined contribution plan, no direct reversion of assets is possible. Halliburton will in no way benefit financially from the reduction of employer contributions under the Plan. Absent a possibility of discrimination or reversion, application of the partial termination rule under the present fact

furthers no policy for which the rule was developed.

The Facts and Circumstances do not Indicate Occurrence of a Partial Termination

Even if the partial termination rules are applicable in a situation such as this where there is no possibility of discrimination or reversion, the facts and circumstances indicate that no partial termination occurred with respect to the Plan in 1986. The absence of discrimination and the absence of an increased reversion are facts to be considered in determining whether a given percentage reduction results in a partial termination. See Document 6678; Internal Revenue Manual.

In addition, during 1986 and 1987, 767 terminated employees have been rehired by Halliburton and will again be eligible to participate in the Plan. Halliburton intends to continue to rehire laid off employees as the economy permits. The large number of rehires through December 31, 1987, as well as the likely hood that many more of the laid off employees will be rehired in the future, are indicative of the fact that no partial termination occurred. See Babb, 764 F2d 240.

Further, the reduction in force in 1986 was necessitated by the downturn in the oil industry and in the regional economy in general and not by any intent on the part of Halliburton to deprive participants of their benefits under the Plan. That the reductions were economically motivated demonstrates that no bad faith on the part of Halliburton

was involved, a mitigating factor which should be considered in determining whether a partial termination has occurred. See, e.g., Taylor vs. Food Giant, Inc. Salaried Employees Pension Plan, 6 E.B.C. 1291 (N.D. Ga. 1984); Kreis, 833 F2d 74.

Moreover, the percentage of employees excluded from the Plan is not sufficiently high to warrant a finding that a partial termination of the Plan occurred. A percentage reduction of only 20.16%, absent discrimination or an increased risk of reversion, does not result in a partial plan termination. See, e.g., Weil, 750 F2d 10, in which a reduction of 27% was held not to constitute a partial termination.

To find a partial termination the percentage reduction must generally be significantly higher than 20%. It is clear that there is no partial termination where

the decline in participation is not at least 20% for the year in question, absent discrimination or reversion. Document 6678; Internal Revenue Manual. The Manual indicates that a 20% minimum rule has never been explained by the Service or the courts. A recent law review article on the partial termination issue offers the following analysis:

> Presumably, the twenty-percent rule is a convenient approximation of the smallest portion of plan participant whose severance would create the potential for either prohibited discrimination through the reallocation of forfeited benefits or unanticipated reversion—"windfall"—to the employer. This would accord with the original purpose of the rule of full immediate vesting upon partial

termination.

Note, Defining Partial Terminations of Qualified Retirement Plans, 5 Virginia Tax Review 521, 537 (1986). The Plan's percentage reduction of 20.16% calculated is barely above the minimum level of 20% at which the IRS Manual directs reviewers to consider the possibility of a partial termination. Absent discrimination or an increased risk of reversion, a reduction of 20.16% is clearly insufficient to warrant a determination that a partial termination of the Plan exists.

Even the 37.61% gross reduction in participants should not result in a finding of a partial termination without additional compelling facts and circumstances. The IRS and the courts generally have found partial terminations only where significantly larger

percentages of employees were terminated. See, e.g., Rev. Rul. 81-27, 1981-1 C.B. 228 (57.6% reduction); Rev. Rul. 73-284, 1973-2 C.B. 139 (80% reduction); Tipton & Kalmbach, Inc., 83 T.C. 154 (34% reduction in 1971 and 51% reduction in 1972). In the absence of discrimination or reversion, the percentage reduction must be very high in order to warrant a finding of a partial termination. For example, the court in Bruch, 828 F2d 134, stated that:

> We believe that the structure of the statute suggests that a partial termination should be found under paragraph 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a

mechanism for the provision of retirement benefits to employees.

Even a percentage reduction in excess of 50%, much higher than presented by the present facts, does not necessarily result in a partial termination. The Manual indicates only that there is a "strong possibility" of a partial termination where the only factor is a decline in participation in excess of 50% in one year. No published IRS rulings or documents and no reported court decisions have found a partial termination on the basis of a one year decline in participation where the decline in participation in that one year is less than 50% (in Tipton & Kalmbach, Inc., 83 T.C. 154, a two year decline of 34% for the first year and 51% for the second year resulted in a finding of a partial

termination of the Plan for each year).

The 20.16% percentage reduction and the 37.61% gross reduction in participation are well below 50% and thus, in the absence of discrimination, reversion or other compelling factors, do not constitute a partial plan termination.

The Plan's Historical Turnover is Relevant to the Partial Termination Analysis

The partial termination analysis does not end with the percentage reduction. A plan's (particularly a defined contribution plan's) historical turnover should also be a relevant factor in analyzing a potential partial termination. Every plan experiences some turnover each year which is indicative of the industry and not reflective of any employer-initiated actions. The apparent intent of

Code section 411(d)(3) is to require full vesting of account of participants terminated as a result of employer-initiated action where the number of participant reductions is dramatically altered from the average or historical level, i.e., "abnormal" terminations. Thus, the excess of a plan's turnover the average or "normal" turnover should be examined as an important factor. The Halliburton Plan's turnover percentages for the three years prior to 1986, based on total reductions are as follows:

| Plan Year | Turnover Percentagef |
|---|---|
| 1983 | 22.70% |
| 1984 | 11.56% |
| 1985 | 10.25% |

The average turnover percentage for these years is fourteen and seventy-four

hundredths percent (14.74%). This percentage represents the "normal" turnover experienced by the Halliburton Plan over a period of time.

The Halliburton Plan's 1986 turnover of 20.16%, calculated above exceeds the average turnover by only 5.42%. Thus, if the excess is the value upon which a partial termination is based, the Halliburton Plan is well below the Internal Revenue Manual's 20% minimum. Even if the Halliburton Plan's gross percentage termination of 37.16% is used, the excess of 22.87% should still not warrant a finding of a partial termination without the existence of additional compelling factors such as the existence of discrimination or an increase in the likelihood of a reversion.

Halliburton Controlled Group Percentage

Reduction

Halliburton believes that a proper interpretation of Code section 414(b) and (c) requires that the determination of whether a partial termination of the Plan occurs must be made on the basis that all employees of all corporations which are members of the Halliburton Controlled Group are treated as being employed by a single employer for purposes of Code section 411(d)(3) as well as the other parts of Code section 411. Therefore, in determining if there has been a significant reduction in the percentage of participation in the Plan (especially where economic adversity is the cause of the reduction) the reduction of participation in all plans maintained by the Halliburton Controlled Group should be aggregated. Consequently, reference should

be made to the total controlled group of corporations which would yield the following percentage reductions.

As of January 1, 1986, there were 51,175 active participants in all plans maintained by the Halliburton Controlled Group and the total reduction in participation during 1986 was 16,997 for the following reasons:

| | | |
|---|---|---|
| (1) Deaths | | 46 |
| Retirees | | |
| (2) Normal | 133 | |
| (3) Early | 1,853 | |
| Total Retirees | | 1,986 |
| 100% Vested: | | |
| (4) Voluntarily terminated | 336 | |
| (5) Terminations for cause | 227 | |
| (6) Layoffs (Involuntary) | 1,695 | |
| Total Terminations 100% Vested | | 2,258 |
| Unvested: | | |
| (7) Voluntary termination | 2,837 | |

| | | |
|---|---|---|
| (8) Termination for Cause | 835 | |
| (9) Lay-offs (involuntary) | 9,022 | |
| Total Terminations-unvested | | 12,694 |
| (10) Transfers to Affiliates | | 13 |
| Total Reduction in Participation | | 16,997 |

The gross reduction in participants during the 1986 Plan Year can be calculated as follows:

$$\frac{\text{Total Reduction in Participants During the Plan Year}}{\text{Total Plan Participants at Beginning of the Plan Year Plus Additions During the Plan Year}} = \frac{16,997}{(51,175+3,505)}$$

The gross reduction in participants calculated using this formula produces a thirty-one and eight one-hundredths percent (31.08%) reduction in Plan

participants.

When, however, the percentage reduction is recalculated in accordance with the foregoing analysis and in accordance with the table shown above, the following results are obtained:

| | | |
|---|---|---|
| Total reduction | | 16,997 |
| (1) Deaths | 46 | |
| (2) Retirees | 1,986 | |
| (3) Voluntary Term. unvested | 2,837 | |
| (4) Total Term. 100% vested | 2,258 | |
| (5) Termination for cause-unvested | 835 | |
| (6) Rehires (through 12/31/87) | 1,296 | |
| (7) Transfers to Affil. | 13 | |
| Total Exclusions | | (9,271) |

| | | |
|---|---|---|
| Reduction in participants | | 7726 |
| Reduction in Participants During the Plan Year | = | 7726 |
| Total Plan Participants at the Beginning Plus Additions During the Year | | (51175+3505) |

This formula produces a fourteen and sixteen one-hundreths percent (14.13%) reduction in Plan participants. This will be even lower when only the excess over the three year turnover average for the Halliburton Controlled Group is considered. These numbers are not readily available at this time but will be provided if necessary.

Conclusions:

Examining the facts of the present

case in light of the purposes of the partial termination rule and case law and other authorities, demonstrates that a finding should be made that no partial termination occurred for the 1986 Plan Year. The case law and IRS authorities discussed above provide ample basis for finding that there was no partial termination of the Plan in 1986.

It is Halliburton's position that given the absence of any possibility of discrimination or reversion or other compelling facts, none of the percentage reductions calculated above are sufficiently high to evidence the existence of a partial termination. An examination of the facts in this case and the precedent leads to the inescapable conclusion that no partial termination of a defined contribution plan should be found where there is not employer-

initiated action of the type set out in the Internal Revenue Manual: plant closing, selling a division, or discontinuance of a product. The mere contraction of the work force due to economic adversity should not lead to a finding of a partial termination of a defined contribution plan absent extremely high percentages (50% or more) of reductions in plan participation. The likelihood of rehires and the problems created thereby mitigate, in this case, against a determination that there has been a partial termination of the Plan.

Also, it is totally uncertain as to the precise point in time when any partial termination of the Plan might have occurred during 1986. It is Halliburton's position that employees who terminated employment, especially voluntary terminations, prior to the periods of time

when reductions in force were in effect are neither affected participants, should there be a partial termination, nor the cause of a partial termination, of one is to be found. Therefore, an opportunity to further refine the reductions, in participation is requested should the service still believe there has been a partial termination based on these numbers for the entire year.

Halliburton respectfully request that the Service make a determination that there was no partial termination of the Plan during 1986.

Government Position and Conclusion:

The IMCO Division employees should be included in the termination data. The IMCO employees were participating in the Plan on January 1, 1986, and were not

participants excluded for the purpose of determining whether a partial termination occurred is:

| | | | |
|---|---|---|---|
| (1) | Deaths | | 32 |
| | Retirees: | | |
| (2) | Normal | 29 | |
| (3) | Early | 1,258 | |
| | Total Retirees | | 1,287 |
| | 100% Vested | | |
| (4) | Voluntarily terminated | 41 | |
| (5) | Termination for cause | 19 | |
| (6) | Lay-offs (Involuntary) | 510 | |
| | 100% Vested Terminations | | 570 |
| | Unvested: | | |
| (7) | Voluntarily termination | 731 | |
| (8) | Termination for cause | 235 | |
| (9) | Lay-offs (Involuntary) | 4,671 | |
| | Unvested Terminations | | 5,6 |
| (10) | Transfers to Affiliates | | 7 |
| | Total Reduction in Participants | | 7,110 |

Reduction in Participants

During the Plan Year

Total Plan Participants = 7533

at the Beginning of Year (18,490+837)

Plus Additions During year

= 38.98%

The difference between the above computation and the taxpayer's computation of total participants who left the plan (7110) is due to the IMCO employees who were participants in this plan.

IMCO Division of Employees:

The IMCO employees should be included in the termination data. Through a Halliburton initiated amendment and a transfer of the employees to a M-I drilling fluid partnership, the employees

who were previously covered by the plan are no longer covered by the plan. See Regs 1.411(d)-2(b). The transfer of plan assets to the IMCO plan would not in and of itself create a partial termination. However, the transfer of the employees to the partnership and the freezing of their accounts constitutes a complete discontinuance of contributions is further supported by the fact that Halliburton amended the plan to provide that the accounts of the IMCO employees would be 100 percent nonforfeitable and that no amount would be contributed by Halliburton to the new IMCO plan.

The IMCO employees should not be excluded because they were 100 percent vested in their account balances. Halliburton fully vested the IMCO employees after the transfer or as a result of the transfer.

All participants were not fully vested at January 1, 1986. Code section 411(d)(3) required that these participants be fully vested because they were affected participants. To exclude the IMCO employee form the computation of total affected participants would be to circumvent the law. Code section 411(d)(3) requires that all affected participants be fully vested. If Halliburton can fully vest a portion of the total affected participants and exclude them from the computation of a partial termination might mean that the remaining affected participants are deprived of benefits under Code section 411(d)(3).

The transferred IMCO employees are not employees of Halliburton but are employees of M-I Drilling Fluids Co., and the plan sponsored by M-I Drilling Fluids Co. which

is not a successor plan for the terminated IMCO plan. Proposed regulation 1.414(c) and Code section 414(c) provides that for the purpose of code sections 401, 410, and 411, employees of a controlled group are considered as employees of a single employer. M-I Drilling Fluid Co. is not under common control of Halliburton. For the employees of M-I Drilling Fluid Co. to be treated as employees of Halliburton, Halliburton would have to own at least 80 percent of the profit interest or capital interest of M-I Drilling Co. See proposed regulation 1.414(c)-2(b)(2)(c). Halliburton owns 40 percent of M-I Drilling Fluid Co. The pension plan of M-I Drilling Co. is a separate plan sponsored by M-I Drilling Co. and not by Halliburton and its employees can not be combined with employees of Halliburton for the purpose of code section 401, 410, and 411.

Death:

Participants terminating because of death should be excluded because they are not employer-initiated terminations.

Retirees:

Normal retirees should be excluded from the employer's initiated terminated. Early retirees should not be excluded from the employers initiated termination. The employees were constructively terminated because Halliburton crated difficult and unpleasant working conditions. See Held vs. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982) and Kred vs. Charles O. Townley, M.D. & Associated, P.C., 833 F.2d 74 (6th Cir. 1987).

Through a source of letters to the

employees, Halliburton created working conditions that those participants who could elect early retirement found intolerable. Henry vs. Lennox Indus., 768 F.2d 746, 752^.3 (G L Cir. 1985) (Quoting Johnson vs. Bunny Bread Co., 646 F.2d 1250, 1256) (8th Cir. 1981). To achieve a desired reduction in employees, Halliburton lowered the early retirement age to age 50 a total of three times between December 16, 1985 and September 30, 1986.

The December 16, 1985, letter stated in part, "This temporary change in the retirement policy is being made due to our existing work load and business forecasts for the immediate future. This plan is not to be used as a precedent for future retirements. It is for the purpose of encouraging early retirements at this time

in our attempts to reduce our work force in line with our business. While we had hoped that normal attrition would accomplish our objectives, additional reductions may be necessary. For those of you who have been contemplating early retirement, we urge your serious consideration during this period which possibly might save the job of another employee." The April 1, 1986, letter from J.A. Dunlop, President, to all employees extending the period for early period to employees who had attained the age of 50 by June 30. The April 1, 1986, letter states in part, "Although we have had a fairly large number of retirements during this first quarter, our work force is not decreasing as fast as our business is declining. Additional reductions have become necessary." The September 30, 1986, letter from J.A. Dunlop to all employees

allowed an employee who attained the age of 50 years by December 31, 1986, to retire early by December 31, 1986.

In addition to the early retirement letters, a letter was addressed to All Halliburton Services' Employees from J.A. Dunlop, President, dated March 27, 1986, addressing the declining business and work force. It also implemented and immediately froze pay rate. The letter states in part, "Our business has been declining rapidly in the past few weeks, and the long term outlook at the present time is not very encouraging.

It has been necessary to reduce our work force in many areas of our operations and we will continue to take measures commensurate with our level of activity.

One measure to be implemented immediately is the freezing of the pay rates of all employees until further notice. This will be effective March 30, 1986, for biweekly employees and April 1, 1986, for exempt employees."

Another letter dated June 13, 1986, to officers, Dunlop Department Heads from J.A. Dunlop, President, implemented a furlough plan to reduce expense and retain experienced employees. The letter also states, "This does not mean that reductions in workforce are to be stopped, or that additional reclassifications, terminations, or transfer of employees should not be made during the course of this program. This is merely another tool to be used to reduce our costs. All other methods to reduce our costs in line with our reduced business will be continued."

The above letters, the lowering of the early retirement age, the furlough and the freezing of wages constitutes a constructive discharge by Halliburton. See Held 684 F.2d 427, 432 (6th Cir. 1982). The constructive discharge is employer initiated and should be used to determine whether a partial termination occurs.

The constructive discharge of the employees is further supported by the fact that layoffs and reduction in force were not uniformly implemented. An employee did not know from day to day if that day was his last day of employment with Halliburton. This uncertainly helped to create the unpleasant and difficult working conditions which lead to a significant higher than normal early retirement rate. See Held 684 F.2d 427, 432 (6th Cir. 1982). The constructive

discharge is very clear when the number of early retirees for 1985 is compared to the number of early retirees for 1986. There were only 423 early retirees in 1985 and 1258 early retirees in 1986. This is an increase in early retirements of 197%. To put it another way, there were nearly three times as many early retirees this year as last year.

Further, the fully vested retirees who were constructively excluded should not be excluded from the calculation because they are affected participants. Code section 411(d)(3).

Voluntary Terminations:

Voluntary terminations which are employer's initiated should be included in determining whether there has been a

partial termination. See Rev. Rul. 73-284. For the same reasons cited above in Retirees, the excluded participants listed under voluntary terminations were constructively discharged by Halliburton.

Fully Vested Employees

Participants who are fully vested and are laid off should be counted in determining whether a partial termination has occurred. Laid off participants are no longer covered under the plan because of an employer initiated action. See Reg 1.411(d)-2(b)(1). Congress, in enacting Section 401(a)(7), sought to protect employees from forfeiting their retirement benefits under termination of the plan. United Steelworkers of America vs. Harris & Sons Stell Co., 706 F.2d 1289, 1299 (3rd Cir. 1983). Where there is a partial

termination of a plan, the rights of all affected employees to their account balances should be nonforfeitable. All of the employer initiated terminations should be included in determining whether a partial termination has occurred. But to determine which of the terminated employees are to be fully vested in accordance with Code section 411(d)(3) we only need to fully vest those affected employers who were not fully vested at the time of the partial termination.

The fully vested employees are affected participants. Because they are excluded from the plan, they no longer will share in the employer's contribution, forfeitures nor earning from the trust. They are affected participants for the purpose of the partial termination.

Termination for Cause:

Those participants who were terminated for cause should not be counted in the partial termination calculation because their termination is not employer initiated.

Rehires:

Rehires should not be excluded from the total reduction. Where a significant number of participants are excluded from participation through an employer initiated action is a partial termination of the plan. All affected participants should be entitled to 100% of their account balance. See Code section 411(d)(3). The fact that Halliburton excluded a significant number of participants from participating in the plan was due to adverse economic

conditions does not make the exclusion not employer-initiated. See Tipton Kalmbach, Inc. vs. Commissioner, 83 T.C. 154 (1984). Halliburton states that its laid off 4871 participant. As of December 31, 1987, one year later, Halliburton had rehired 767 terminated participants. At this rehire rate, it would take 6.09 years to rehire only the involuntary laid-off participants. Such a rehire rate could hardly support the conclusion that the reduction in the workforce was temporary as opposed to permanent reduction. In addition there is no case law or other authority that provides that a temporary reduction in workforce is not a partial termination within the meaning or Code section 411(d)(3) and regulation 1.411(d) 2(b).

A permanent reduction in Halliburton's

workforce is further supported by the plan provision which allows for distribution of a terminated participants vested account balance and the forfeiture of the participant's nonvested account balance on the participant's incurring a one year bread in service. If Halliburton intended for the reduction to be temporary, it would appear that Halliburton would not allow such a quick distribution of benefits and forfeitures. If it is determined that rehires should be excluded from the calculation, it should be only those employees rehired during the 1986 plan year only and not the total as shown by Halliburton.

Transfer to Affiliates:

Employees transferred to an affiliate of Halliburton should not be included in the

partial termination.

Based on the above analysis, the percentage reduction calculated in accordance with the government position is as follows:

| | | |
|---|---|---|
| Total Reduction | | 7533 |
| Less: | | |
| Death | 32 | |
| Normal Retiree | 192 | |
| Termination for cause | | |
| 100% Vested | 19 | |
| Unvested | 235 | |
| Trasfer to Affiliate | 7 | |

Reduction in Participants

During the Plan Year

Total Plan Participants = 7211

at the Beginning of Year (18,490+837)

Plus Additions During year

= 37.31%

The above computation support the government's position that a partial termination occurred in 1986. See Tipton's Kalmbach, Inc., 83 T.C. 154 (1984) where it was held that a 34% discharge or Plan participants constituted a partial termination of the Plan. Also see Weil, 750 F2d 10. When it was determined a termination of 27% or plan participation is not a low enough percent drop to rule out a partial termination.

Not only do the participants who were excused from participation in the Plan by Halliburton's initiated action represents a significant percentage of the Plan's total participants, but the excluded participant represent a significant number of the Plan participants. The IRS in

planning the regulations made it clear that the dismissal of a significant number of employees constituted a partial termination. Rev. Rul. 73-284, 1973-2 C.B. 137; Rev. Rul. 72-510, 1972-2 C.B. 223. This approach to determining a partial termination based on the number of employees terminated in connection with a significant corporate on Plan event is supported by House and Senate Committee reports that accompanied the various drafts of ERISA. See Weil, 750 F2d 10 and H.R. Rep. No. 93-807, 93rd Cong., 2d sess. 65 (1974) (Reprinted at 1974-3 C.B. Sup. 236, 300) ("A partial termination might include, under certain circumstances, a large reduction in the work force or a sizable reduction in benefits under the Plan..."); S. Red. No. 93-383, 93rd Cong., 1st Sess. 50 (2973), U.S. Code Cong.; Admin. News 1974, P. 4639 (Reprinted at

1974-3 C.B. Sup. 80, 129) (same). See Weil, 750 F2d 10. In 1986, the Halliburton Plan incurred both a large reduction in the workforce (7153 participant) and a sizable reduction in benefits under Plan ($55,675,802.00 in forfeitures).

IRS has made it clear through regulations, ruling and judicial precedent that a significant factor in determining whether a partial termination has occurred is the number and percentage of Plan participants who are involuntarily excluded from the Plan by the employer. See Babb vs. Olney Paint Co., 764 F2d 242; Weil vs. Retirement Plan Admin. Comm. for the Terson Co., 750 F2d 10, 12 (2nd Cir. 1984); EHM vs. Phillips Petroleum Co., 583 F. Supp. 1113, 1115 (D Kan. 1984); Wishner vs. St. Luke Hosp. Center, 550 F. Supp. 1016, 1019 (S.D.N.Y. 1982); Taylor vs.

Food Giant, Inc. Salaried Employees Pension Plan, No. C84-253 (N.D. GA. Nov. 30, 1984); and revenue ruling cited in those cases. A significant reduction in Plan participants who were involuntarily excluded from the Plan can and of itself standing alone constitute a partial termination. See Bruch vs. Firestone 640 F. Supp. at 530-31; EHM vs. Phillips Petroleum, 583 F. Supp. A71115; Kreis vs. Charles O. Townley, M.D. & Assoc. P.C., 833 F2d 74 (6th L Cir 1987). The use of the number of participants excluded from the participation by the government is not contrary to the intent and development of Code section 411(d)(3) and regulation thereof.

It is true that when Congress added paragraph (7) to section 1401(a) in 1962 (Self-Employed Individuals Tax Retirement

Act or 1962, Pub. L. 87-792, Sec. 2, 76 Stat. 809), it was to prevent abuses resulting from terminations of forfeitable plans. The provision was prompted by congressional concern that absent such a requirement, an owner-employer would be able to establish a forfeitable retirement plan for his employees, make deductible contributions on which he would enjoy a tax-free buildup or income, then terminate the plan and have all amounts revert back to him. Section 407(a)(7) prevented this.

Congress, however, applied section 401(a)(7) to all retirement plans, including corporate plans, not merely to those that covered owner-employees. 4 Rept. 378, 87th Cong. 1st Sess. (1962), 1962-3 C.B. 276 at 275; S. Rept. 992, 87th Cong. 1st Sess (1962), 1962-3 C.B. 303, 328. The enactment of section 401(a)(7)

was to protect employees from forfeiting their retirement benefit upon termination of a plan. See Tipton & Kalmbach, Inc. vs. Commissioner, 83 P.C. 154 (1984). Where the employer has caused a partial termination of the plan, all affected participants rights to their complete account balance should be non-forfeitable. Code 411(d)(3). This is without regard to where there exists a possible reversion to the employer or where there is a lack of discrimination.

Conclusion:

The absence of discrimination and the absence of an increased reversion are facts and circumstances to be considered only when the employer initiated reduction in plan participants is not in of itself sufficient to warrant a partial

termination. See Babb vs. Olympia Paint Co., 764 F2d also and Weil vs. Retirement Plan Admin. Comm.: for the Tersol Co., 750 F2d 10, 12 (2nd. Cir. 1284). To say that the absence of discrimination and the absence of an increase reversion would cause an otherwise partial termination not to be treated as a partial termination is to say that a partial termination not to be treated as a partial termination is to say that a partial termination cannot occur in a profit sharing plan which allocates forfeiture to remaining participants and which has no prohibited group members. Even if the employer terminates more than 50% of the participants excluded from the plan by Halliburton is sufficient to warrant a partial termination without considering other facts and circumstances.

In this case, rehire of 767 terminated employees is not an indication that a partial termination has not occurred. It is more an indication that the reduction in the plan participation is a permanent reduction and a partial termination has occurred. Another indication of the permanent reduction is the plan allowing distribution of terminated participants benefits upon their incurring a one year-break in service.

A down turn in the oil industry and in the regional economy in general is not a fact and circumstance which indicates no partial termination occurred, not is the intent to deprive participants of their benefit under plan a reason for exclusion of terminated employee from the calculation. See Lipton & Kalmbach Inc. vs. Commissioner, 83 T.C. where it was

held that neither intent to deprive participants of benefits nor decrease in the employer's business were circumstances which would not cause a partial termination.

Turnover:

Halliburton's turnover rate supports a partial termination. The average turnover percentage for the last three years was 14.74% as computed by Halliburton. Its turnover for 1986 is 20.165. This is an increase of 36.77%. (20.16%-14.74%)/14.74%. That is, Halliburton turnover is 36.77% greater this year than it was for the average of the last three years. This is a significant percentage increase and supports a partial termination. This percentage is greater if the increase is calculated using the

government position of excluded participants and greater when considering Halliburton's turnover for the last two years. Using the government analysis the increase in the average turnover is 153.12%. (37.31%-14.74%)/14.74%. Using the last two years the increase is 47.96%. (21.81%-14.74%)/14.74%. Code section 414(d)(3) regulations and court cases makes it clear that a partial termination is based on the exclusion of a significant number of participants from a plan. The determination is not based on the number of employees terminated or laid off by the employer. See Reg. 1.411(d)-2(b) and all court cases cited in this report.

Code section 414 provides that all employees of a controlled group are treated as employed by a single employer. This is not to say that all employees of

the controlled group must be included in a single plan. If when calculating the significant number of excluded participants we must include all employees of the controlled group, then all employees of the controlled group must have been participants in the Plan. The only employees that should be used to compute the significant percent are the employees who are participants in the Plan not in every plan of the employer.

Notwithstanding the lack of authority for using the controlled group to compute a partial termination for the Plan, if the controlled group was used, in this case it would still warrant a partial termination of all plans. A reduction of 7726 in plan participants in all plans is still a significant number of excluded participants and the reduction in plan

benefits, is still significant reduction. See Weil, 750 F2d 10.

Based on the number and percentage of plan participants who were excluded from the plan by Halliburton initiated action, and on the size of the reduction in plan benefits, the plan was partially terminated in 1986. This conclusion is supported by the case law code and regulations cited in the government position. All affected participants must be 100% vested in their account balances.

IRS Appeals Division

December 10, 1989

Halliburton Profit Sharing Plan

SUPPORTING STATEMENT

TAXPAYER: HALLIBURTON

I. Issue:

Whether the qualified status of the Halliburton Profit Sharing Plan, plan number 001, under IRC section 401(a) should be revoked for plan year ending December 31, 1986, and all subsequent years due to a determination that affected plan participant's benefits, were not treated as nonforfeitable as a result of a partial termination of the plan.

II. Proposals for Settlement

That the government concede the issue.

III. Findings of Fact:

Taxpayer's Business

Taxpayer adopted the Halliburton Profit Sharing and Savings Plan (the plan) for its employees on January 1, 1944. The plan has since been amended seven times and received several favorable determination letters. The plan received its last favorable determination letter on January 16, 1986.

Taxpayer, together with the other members of its controlled group of corporations was one of the world's larger and more

diversified oil field services and engineering/construction organizations. The Controlled Group, both domestic and international, was generally divided into three principal categories of operation: oil field services and products; engineering/construction services; and marine engineering/construction services. Also, the Controlled Group engaged in writing multi-line property and casualty insurance, life, health and accident insurance and provided health care cost containment and claims administration services. Approximately three-fourths of the consolidated net revenues (not including insurance services) of the controlled Group are derived from services the petroleum industry. Generally, thirty percent of revenues came from international sales and services.

The oil field services and products component of the Controlled Group was a major provider of products and services, both on shore and offshore, to the exploration and production segments of the petroleum industry. The industrial engineering/construction services component provided design, construction, and contract maintenance services for the petroleum industry, public utilities, general industry and government. The marine engineering/construction services component performed services predominately for the petroleum industry, including the design, fabrication and installation of offshore structures, facilities and pipelines on a world wide scale.

The oil field services component included several operating divisions of taxpayer as well as the operating subsidiaries of Otis

Engineering Corporation, and Jet Research Center, Inc. Likewise, the engineering and construction services component included Brown and Root.

Economic Condition

For several years, worldwide oil and gas production, in excess of existing demand, along with the absence of major industrial expansion in the United States, and the resulting decline in crude oil prices had together operated to depress the markets of the energy-related components of taxpayer. The American Petroleum Institutes's data showed a decline in production during 1986 of about 700,000 barrels per day. At 8.43 million barrels a day, the United States production rat was the lowest that it had been since 1977 when the dependence on imports reached an

all-time high of 48%.

Reinvestment in exploration and production during 1986 was at the lowest levels since World War II. The steepest decline occurred during the first seven months of 1986. The profit of taxpayer is closely tied to the domestic rotary rig count. Even with early retirements, voluntary terminations, layoffs and furloughs, taxpayer still experienced record operation losses during 1986.

Reduction in Force

During 1986, it became necessary for taxpayer to reduce its work force to match its declining business. To reduce its work force to match its declining business. To reduce its work force and cut cost, taxpayer lowered its early retirement age

to 50, implemented a wage freeze, laid off employees and furloughed employees.

Taxpayer made no general announcements regarding layoffs but a letter to employees announcing the lowering of early retirement age to age 50 in December 1985 indicated that additional reductions in force over and above and above normal attrition might be necessary. Likewise, the letter to employees on April 1, 1986, extending the early retirement opportunity to June 30, 1986, reiterated that the work force was not decreasing as fast as business was declining and additional reductions had become necessary. Another letter was written to all employees on September 30, 1986, again lowering the early retirement age to 50 until December 31, 1986. In addition to the early retirements usually occurring between 55

and 65, persons electing early retirement before age 55 were not sufficiently large in number to reduce costs, by the end of March, 1986, to the desired level. On March 27, 1986, a letter was written to employees informing them of a wage freeze and that it had been necessary to reduce the work force in many areas of operations.

In addition to the reductions in force, a furlough plan was established in late June of 1986 to further reduce costs. Most employees were asked to take every eighth week off without pay. Although the furlough plan does not reduce costs as much as additional layoffs, taxpayer believed that it was a more equitable method of sharing the economic burden with which it was faced. The furlough program permitted retention of more employees;

fewer employees lost jobs and a core of skilled workers was retained for the future. Therefore, when economic adversity subsided, taxpayer would be able to respond immediately and to capture the opportunity with this core of loyal and skilled workers and perhaps rehire earlier some employees that were laid off. However, the furlough did not stop the lay-off or other reductions in work force. All employees were aware that layoffs were occurring. Layoffs and reductions in force were effected by departments and divisions and were not uniformly implemented.

By letter dated April 27, 1987, taxpayer filed with the Dallas Key District of the Internal Revenue service and application for a determination that the Plan as amended by the First and Second Amendments and the related trusts, continued to meet

the requirements of Section 401(a) and Section 401(k) of the Internal Revenue Code of 1986, as amended, (the "Code"). Further, the taxpayer requested a determination that there had not been a partial termination of the Plan in 1986.

The various corporations in each of the components maintained several retirement plans, which, in the aggregate, covered a significant number of the employees in the Controlled Group. For the most part, the plans were defined contribution plans of the profit sharing type. There were also, however, a few small defined benefit pension plans which were being funded to operate on an actuarially sound basis.

As of January 1, 1986, the Plan covered 19,334 (includes IMCO employees) participants. During 1986, 414 new

participants entered the Plan and 141 rehires (terminated after January 1, 1986) reentered the Plan, for a total of 19,748 participants who were participants for all or part of the 1986 Plan Year.

All of the retirement plans maintained by other members of the Controlled Group covered 32,844 employees as of January 1, 1986.

In an attachment to the application the taxpayer provided the following data:)

| | 1984 | 1985 | 1986 |
|---|---|---|---|
| (i) Participants | | | |
| (a) # at begin of year | 20,667 | 19,892 | 18,490 |
| (b) # added during year | 1,479 | 2,354 | 555 |
| (c) Total | 22,146 | 22,246 | 19,045 |
| (d) # dropped | | | |

| | | | |
|---|---|---|---|
| during year | 2,254 | 2,912 | 7,110 |
| (e) # at end of plan year | 19,892 | 19,334 | 11,935 |
| (f) # separated without full vesting | 1,717 | 1,678 | 5,500 |

*844 participants moved to a comparable plan.

The taxpayer provided additional detail regarding the number dropped (line d) for 1986 as follows:

| | | | |
|---|---|---|---|
| (1) | Deaths | | 32 |
| | Retirees: | | |
| (2) | Normal | 22 | |
| (3) | Early | 1,200 | |
| | Total Retirees | | 1,222 |
| | 100% Vested | | |
| (4) | Voluntarily terminated | 37 | |
| (5) | Termination for cause | 18 | |
| (6) | Lay-offs (Involuntary) | 294 | |
| | 100% Vested Terminations | | 349 |

| | | |
|---|---|---|
| | Unvested: | |
| (7) | Voluntarily termination | 694 |
| (8) | Termination for cause | 228 |
| (9) | Lay-offs (Involuntary) | 4,578 |
| | Unvested Terminations | 5,500 |
| (10) | Transfers to Affiliates | 7 |
| | Total Reduction in Participants | 7,110 |

The above data does not include 844 employees as of January 1, 1986) of the former IMCO Services Division.

Late in 1986 taxpayer combined its IMCO Services Division into a joint venture with Magcobar, a division of Dresser Industries, Inc. This combination resulted in a more efficient and economically viable drilling fluids business than either partner could develop alone. the

new company, M-I Drilling Fluids, Co., had a very strong market position as a result of the joint venture.

M-I Drilling Fluids Co. was owned 60% by Dresser and 40% by taxpayer. Employees of the IMCO Division who were participants in the Plan were transferred to and became participants in a new plan established by M-I Drilling Fluids Co. This plan was a profit sharing plan with a cash-or-deferred thrift feature with provided employer matching contributions for a portion of the employee's elective deferral contributions.

The accounts in the Plan for IMCO employees were spun off and the matching trust assets were transferred to the new IMCO plan and trust maintained by taxpayer for their benefit. The IMCO plan contains

only former employees of taxpayer and is not the plan mentioned above sponsored by M-I Drilling Fluids Co.

The IMCO plan was then frozen and all accounts were 100% fully vested and nonforfeitable as of the spin-off. The IMCO Plan continues to share in the investment earnings of taxpayer's master trusts, which was better than the employees would likely have enjoyed under the smaller investment portfolio in the new plan established by M-I Drilling Fluids. Taxpayer made a business decision to fully vest all IMCO Plan participants who were employees in the IMCO Division because they would be transferring to M-I Drilling Fluids and taxpayer desired that their account balances in the IMCO Plan be preserved for their retirement.

On December 22, 1986, 616 employees (including over 400 Plan participants) transferred to M-I Drilling Fluids Co. These employees participated in the new M-I Drilling Fluids Plan and the participants also retained their fully vested account balances with the IMCO Plan.

Plan Provisions

The Plan provided in pertinent part the employees would be fully vested in their account balance upon death, retirement, disability or termination of employment after attaining age 50 or completing 15 years of credited service.

If an employee terminated employment of reasons other that disability, death or retirement, and prior to becoming 100%

fully vested in his account balance, the Plan provided that he would forfeit, no later that the time that his termination of employment resulted in a five year break-in-service, that part of the account balance to which he is not entitled. See Plan Section 10.04(a).

Effective as of January 1, 1987 (for terminations of employment after that date), forfeitures occurred at the time of a cash-out distribution if such distribution was earlier than the date on which a five year break-in-service occurred. In all events, however, the forfeiture occurred no later than the date on which a five year break-in-service occurred.

For terminations of employment prior to January 1, 1987, however, forfeitures

could also occur earlier than the date of five year break-in-service. A forfeiture occurred as of the later of a one year break-in-service or a cash-out distribution. In no event, however, would a forfeiture be delayed until after a five year break-in service.

Although the Plan provided (prior to January 1, 1987) that a termination of employment by reason of a reduction in force would, upon the participant's election, permit the payment of benefits as soon as practicable after the date that such participant terminates employment, forfeiture with respect to reductions in force occurred as of the day on which a one year break-in-service occurred. In all events, amounts attributable to employees who terminated employment in 1986 generally were not forfeited until

sometime in 1987 and were thus allocable as "termination surplus" as of December 31, 1987.

Section 16.05 of the Plan provided that upon a partial termination of the plan, the rights of each participant and beneficiary affected by such partial termination to the amounts credited to his account would be fully vested as of the date of such partial termination.

By letter dated September 7, 1989, the District Director, in response to the application, notified the taxpayer that based on the number and percentage of plan participants who were excluded from the plan by taxpayer initiated action the plan was partially terminated in 1986. The taxpayer disagreed.

Law and Argument

Section 401(a)(7) provides that a trust forming a part of a profit-sharing, stock bonus or pension plan shall not constitute a qualified trust unless the plan of which such trust is a part satisfies the requirements of section 411. Section 411(d)(3) states, in pertinent part, that upon the termination or partial termination of a plan, the rights of all affected employees to benefits accrued to the date of termination or partial termination, to the extent funded as of such date, or the amounts credited to the employees' accounts, are nonforfeitable.

Section 1.411(d)-2(b) provides that whether or not a partial termination occurs (and the time of such event) shall be determined by the Commissioner with

regard to all the facts and circumstances in a particular case.

The Tax Court in Tipton & Kalmbach, Inc. v. Commissioner, 83 T.C. 154 (1984), dealt with the issue of whether a partial termination had occurred. The Court stated in pertinent part that the issue was one of first impression in this Court.

The Court went on the discuss what it felt was the Congressional intent in this area. It was noted that while section 401(a)(7) precluded the possibility that contributions might revert back to owner-employees upon termination of a plan, Congress had applied this provision to all plans not just those of owner-employees. Thus, the Court stated:

We infer from this a broader

> ameliorative purpose that simply one of preventing the reversion of contributions to an owner-employee. We think that Congress, in enacting section 401(a)(7), sought to protect employees from forfeiting their retirement benefits upon termination of a plan.

Next, the Court stated:

> The few cases that have considered Federal income tax law controlling have adopted the "significant percentage" test of respondent's revenue rulings...; thus, in determining whether a partial termination occurred, those cases have looked to whether a significant percentage of plan participants were excluded from coverage.

In Rev. Rul. 72-439, 1972-2 C.B. 223, a partial termination occurred where 70 percent of the plan's participants (120 of 170) became ineligible to participate in future employer contributions by reason of a plan amendment. It did not matter in Rev. Rul. 72-439 that the employees excluded from participation were still eligible to vest in accrued amounts earned prior to the plan amendment as long as they remained in the service of the employer. Rev. Rul. 72-284, 1973-2 C.B. 139, held there was a partial termination of a plan when as a result of a change in business location 80 percent of the plan participants (12 of 15) who refused to relocate were removed from employment. Both revenue rulings held that significant percentages of employee-participants were discharged. Rev. Rul. 72-510, 1972-2 C.B. 223, found a partial termination where a

division was closed down and 95 of 165 participants (or 58 percent) were discharged in connection with the winding up of a part of the employer's business.

Cases where a significant percentage was not present are: Kreis v. Charles Townley, M.D. & Associates, 883 F 2nd 74 (6th Civ 1987), (exclusion of 15% and 13.6% of plan participants); Wishner v. St. Luke's Hospital Center, 550 F. Supp. 1016, (S.D.N.Y. 1982) (exclusion of 3.7% of plan participants); Ehm v. Phillips Petroleum Co., 583 F. Supp. 1113, (D. Kan. 1984) (exclusion of 2.7% of plan participants).

On the other hand, cases where a significant percentage was found are: Tipton & Kalmbach, Inc. supra (exclusion of 34% and 51% of plan participants); Weil v. Retirement Plan Admin. Committee for

the Terson Co., 750 F.2d 10, (2d Cir. 1984) (exclusion of 27% of plan participants).

In addition to the raw percentage the "significant percentage" test only has relevance when the substantial reduction in participation under the plan was the result of employer-initiated action. In Weil, supra, the Court stated:

> ...this approach to defining "partial termination"-viz., focusing on the number of employee terminations made in connection with significant corporate or plan events - is supported by the House and Senate Committee Reports that accompanied the various drafts of ERISA. (Emphasis Added)

In Weil, supra, the Court implied that if the termination were voluntary, or involuntary but unrelated to the impending acquisition and reorganization, these facts would militate against any finding that a partial termination occurred.

In Sage v. Automation, Inc. Pension Plan and Trust, 845 F.2d, 885 (10th Cir 1988) the Court stated:

> Voluntary employee decisions to leave the employer or terminations not connected with the significant corporate event do not constitute "employee terminations" which would trigger partial termination.

In G.C.M. 39344, it states:

> Employee-participants do not need

protection from any possible employer abuses if the reason retirement benefits are forfeited is the result of voluntary employee behavior that did not occur as a result of employer-initiated action.

The Court in Kreis, supra noted:

Appellees argue that this "significant percentage" factor is the only circumstances that we should consider. That argument lacks merit. The regulation's plain language clearly directs us to consider all the facts and circumstances, of which the percentage of excluded plan participants in but one, albeit generally the most persuasive one. (citations omitted) of course, in a particular case the percentage may be

> so high or so low as to be determinative standing alone,... (citations omitted).

Although disagreeing on the numbers to be included in the calculations both the District Director and taxpayer agree that the proper formula for computation of the percentage reduction is as follows:

$$\frac{\text{Total Reductions in Participants During the Plan Year}}{\text{Total Participants at Beginning of Year} + \text{Additions During the Year}}$$

The taxpayer and the District Director agree on some of the classes of participants to be included in the numerator and disagree on others. The

taxpayer and the District Director agree that employees whose employment terminated by reason of the following events may be excluded: death, normal retirement, termination for cause and transfer to affiliates.

Likewise, both the taxpayer and the District Director agree that those employees who were involuntarily terminated or laid off and not fully vested should be considered in determining whether a partial termination occurred.

Next, both the taxpayer and the District Director agree that if it's determined that early retirees and those who voluntarily terminated were "constructively discharged" they also should be considered in the determination of whether a partial termination occurred.

Both the taxpayer and the District Director disagree on whether the following groups should be considered in the partial termination decision:

IMCO Division Employees

Fully Vested Employees

Rehires

Early Retirees & Voluntary Terminations: Constructive Discharge.

The District Director maintains that early retirees and those who voluntarily terminated should be considered in applying the "significant percentage" test.

The District Director argues that through a series of letters sent to employees, the lowering of the early retirement age,

furloughs, wage freezes and layoffs the taxpayer constructively discharged these employees.

The taxpayer disagrees.

We agree with the taxpayer.

In Young v. Southwestern Savings & Loan Assn, 509 F 2d 140 (5th Cir. 1975), the Court stated the standard for determining whether an employee had been constructively discharged.

The general rule is that if the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct

involved therein as if it had formally discharged the aggrieved employee.

In Bourque v. Powell Electrical Mfg. Co., 617 F 2d 61, 65, (5th Cir. 1980), the Court noted:

> To find constructive discharge we believe that "the trier of fact must be satisfied that the... working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."

In Young, supra, the Court held that mandatory attendance at company prayer meetings imposed an intolerable working condition because attendance would have forced the employee to sacrifice her

fundamental religious beliefs.

In Bourque, supra, it was determined that the plaintiff suffered sexual discrimination because she was paid at least $200 per month less than males performing essentially the same duties. But, the Court found that she was not constructively discharged because working for unequal pay did not constitute a condition of employment so intolerable that an employee was forced into involuntary resignation.

In the instant case, it is hard to believe that the District Director would seriously contend that letters addressed to all employees, the lowering of the early retirement age, furloughs and wage freezes would give rise to working conditions approaching those of Bourque let alone

Young. In fact, the record indicates that these measures were intended to add as much stability to the workplace as possible and therefore improve the working conditions. The letters kept the employees informed while the other measures were implemented to make layoffs unnecessary. A very reasonable argument can be made that these measures reduced the number of involuntary terminations thereby reducing the amount of forfeitures.

IMCO Division Employees

The District Director insists that the IMCO Division employees be considered in the calculation of the percentage reduction for 1986. In support the District Director raises several different arguments.

The taxpayer disagrees and raises several arguments in rebuttal.

Reviewing the record and the law we agree with the taxpayer that the IMCO Division employees should be excluded but for a reason more basic than either the arguments advanced by the District Director or the taxpayer.

As noted above the "significant percentage" test only has relevance when the reduction in participation was the result of employer-initiated action. The IMCO Division employees ceased participation in late 1986, but as a result of an employer-initiated action separate and distinct from the taxpayer initiated layoffs necessitated by adverse economic conditions.

Fully Vested Employees

The District Director maintains that participants who were fully vested and were laid off should be counted in determining whether a partial termination had occurred. The reason seems to be that if they were not counted the computation of the percentage would be skewed in such a way that it would disguise the real impact of the employer initiated action and therefore the other participants who were parties to a significant employer initiated action would be deprived of their right to full vesting.

We agree with the District Director and believe that at least some support exists for this position.

In Tipton & Kalmbach, supra, the Tax Court

looked to whether a significant percentage of plan participants had been excluded from coverage. Likewise, in Revenue Ruling 72-439, 1972-2 C.B. 223, the focal point was the number of employees excluded from participation even though they were still eligible to vest. Consequently, whether or not an employee is vested is not determinative in deciding whether a partial termination had occurred. Thus, fully vested employees should be included in the calculation of the percentage reduction in plan participants.

Rehires

The taxpayer maintains that participants who were subsequently rehired without a loss of benefits should be excluded from total reductions. The rationale is that the partial termination provisions were

intended to apply to permanent reductions.

The District Director maintains that the reductions were permanent and therefore should not be excluded from the percentage reduction computations.

We agree with the District Director. If the taxpayer's argument were accepted it would create an intolerable administrative burden. This is so, since the taxpayer's argument would in essence put off any determination of whether a partial termination took place until five consecutive one year breaks-in-service occurred.

At conference, the taxpayer acknowledged the administrative burden but noted that the IRS has never felt constrained to one year, but has often looked to reductions

in consecutive years to argue that a partial termination occurred. Therefore, the taxpayer should be free to look at plan participation over several years to show a partial termination did not occur. The taxpayer pointed to Tipton Kalmbach, supra, and asked, whether a percentage reduction of 34% would have been sufficient to justify a finding of a partial termination without the subsequent years percentage reduction of 51 percent?

The taxpayer's position has some appeal but, it is believed that the administrative burden would be so great that it would outweigh the merit of the taxpayer's position.

Adjusted Percentage Reduction

Based upon the above discussion and

determinations the percentage reduction in 1986 is determined to be as follows:

| | | |
|---|---|---|
| Total Reduction | | 7110 |
| Less: Deaths | | 32 |
| Retirees- | | |
| Normal | 22 | |
| Early | 1200 | 1222 |
| 100% Vested- | | |
| Voluntary termination | 37 | |
| Termination for cause | 18 | 56 |
| Unvested- | | |
| Voluntary termination | 694 | |
| Termination for cause | 228 | 922 |
| Transfers to affiliates | | 7 |
| | | 2239 |
| Adjusted reduction in participants | | 4871 |

$$\frac{4871}{18490 + 414} = 25.77\%$$

Is this a significant percentage? We believe it is. Earlier it was noted that the Weil, supra, Court found that the exclusion of 27 percent of plan participants was significant. In the instant case we are dealing with a percentage which has been adjusted to eliminate, with the exceptions of fully vested and rehires, all areas of disagreement in the computation.

The longstanding rule of thumb is that, where 20 percent or more of the employees covered by a plan are excluded, there is a partial termination issue. This guideline originally come into existence because former IRS Form 4848, solicited information on whether the number of participants had decreased by 20 percent or more from the previous year. The rules continued validity is supported by the

fact that an 80 percent/75 percent decrease in participation is a Pension Benefit Guarantee Corporation reportable event described in ERISA section 4043(b)(3). Laarman and Hildebrandt, 357 T.M., Plan Terminations and Mergers, at A-17.

Facts and Circumstances

As noted by the Kreis, supra, Court, the "significant percentage" factor is not the only circumstance to consider. The regulations require that all facts and circumstances be considered in deciding whether a partial termination has occurred.

The taxpayer points to the following other facts and circumstances in arguing that a partial termination did not occur:

. The Plan is a profit-sharing plan which precludes the possibility of a reversion.

. The Plan will not permit any prohibited discrimination by reason of the reallocation of the forfeitures.

. The reduction in participants was the result of a temporary downturn in the economy.

All these points are valid and worthy of consideration, but we believe they are not persuasive in this case.

The only other factor cited by the District Director is the sheer number of terminated non-vested participants (4871).

The taxpayer points out that no court has accepted the idea that the reduction of a

significant number of plan participants can support, standing alone a partial termination.

In Ehm v. Phillips Petroleum Company, supra the plaintiffs urged the Court to disregard the "significant percentage" test when a substantial number of employees were excluded from the plan. The Court refused and stated:

> Although the number of employees excluded in the case at bar (415) is greater than the numbers in either Beck or Revenue Ruling 72-439, we are not persuaded that this difference alone provides an adequate basis for disregarding the significant percentage test.

Although standing alone the number of

terminated participants is not determinative we believe that together with the percentage reduction it is of more importance than the other factors advanced by the taxpayer.

IV Conclusion:

Based upon the record and applicable law it is determined that a partial termination of the plan occurred in 1986. The taxpayer's proposal that the government concede the issue is not proper and it will be recommended that a 90 day letter be issued.

At conference the taxpayer was represented by Ira Cohen. Mr. Cohen was formerly a high ranking government official with the Internal Revenue Service's EP/EO Division.

After a discussion of the issues Mr. Cohen indicated that he was aware that if litigated it was anybody's guess as to the outcome. Further, he indicated that no matter how it was recommended to be settled by the Appeals Division it almost certainly would be litigated by one class of interested parties or another.

**26 U.S.C. §411(d)(3) Termination or partial termination; discontinuance of contributions.-** Notwithstanding the provisions of subsection (a), a trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that--

**(A)** upon its termination or partial termination, or

**(B)** in the case of a plan to which section 412 does not apply, upon complete discontinuance of contributions under the plan, the rights of all affected employees to benefits accrued to the date of such termination, partial termination, or discontinuance, to the extent funded as of such date, or the amounts credited to the employee's account, are nonforfeitable.

**Treasury Regulation §1.411(d)-2(b)(1):**

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan, and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

The legislative history specifically addressing section 411(d)(3) provides:

> Examples of partial termination might include, under certain circumstances, a

large reduction in the work force, or a sizeable reduction in benefits under the plan.

**26 U.S.C. §7476 Declaratory Judgments relating to qualification of certain retirement plans**

**(b)(3) Exhaustion of administrative remedies.**--The Tax Court shall not issue a declaratory judgment or decree under this section in any proceeding unless it determines that the petitioner has exhausted administrative remedies available to him within the Internal Revenue Service. A petitioner shall not be deemed to have exhausted his administrative remedies with respect to a failure by the Secretary to make a determination with respect to initial plan qualification or

continuing qualification of a retirement plan before expiration of 270 days after the request for such determination was made.

Supreme Court, U.S.
FILED
OCT 24 1994
OFFICE OF THE CLERK

No. 94-594

In The

# Supreme Court of the United States

October Term, 1994

KEN NASH,

*Petitioner,*

v.

HALLIBURTON COMPANY AND COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT HALLIBURTON COMPANY'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

(1) Whether the decisions of the United States Tax Court and the United States Court of Appeals for the Fifth Circuit in this case failed to adhere to this Court's ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by not deferring to either (i) the positions of the District Director and Appeals Officer of the Internal Revenue Service expressed in a proposed adverse determination letter or (ii) the position of the Commissioner set forth in briefs as a party to this litigation in the Tax Court and the Fifth Circuit;

(2) Whether the Fifth Circuit's holding in this case is in conflict with the Second Circuit's decision in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991), with respect to the application of *Chevron*; and

(3) Whether certiorari should be granted because the substantive issue involved in this case "affects large numbers of persons."

## LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY[1]

Following is a list of entities in which Halliburton Company directly owns an interest of less than 100 percent:[2]

| Entity Name | Ownership <100% | Country of Incorporation |
|---|---|---|
| Amsito Oilwell Services (Malaysia) Sdn Bhd | 49.00000 | Malaysia |
| Corporate Officers & Directors Assurance Ltd | 1.88679 | Bermuda |
| Gearhart Espana SA | 1.00000 | Spain |
| Goinbras Industria E Comercio do Brasil Ltda | 0.20000 | Brazil |
| GSI Saudi Arabia Limited | 75.00000 | Saudi Arabia |
| Halliburton Cementacao Limitada | 99.99835 | Brazil |
| Halliburton do Brasil-Servicos, Comercio e Ind Ltda | 99.97642 | Brazil |
| Halliburton Geophysical Argentina SA | 99.99994 | Argentina |
| Halliburton Geophysical Services (M) Sdn Bhd | 70.00000 | Malaysia |

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[1] There is no parent company of Halliburton Company.

[2] Each ownership percentage reflects Halliburton Company's interest owned directly without the application of the constructive ownership rules of the Internal Revenue Code of 1986, as amended.

## LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY – Continued

| Entity Name | Ownership <100% | Country of Incorporation |
|---|---|---|
| Halliburton Geophysical Services de Mexico SA CV | 99.99998 | Mexico |
| Halliburton Holdings, Inc | 42.14876 | United States |
| Halliburton Oilfield Services India Ltd | 60.00000 | India |
| Halliburton Services (Malaysia) Sdn Bhd | 49.00000 | Malaysia |
| Halliburton Servicios Petroleros (Chile) Ltda | 92.06349 | Chile |
| Halliburton Servicos Geofisicos, Ltda | 0.00011 | Brazil |
| Halliburton Trinidad, Ltd. | 99.99500 | Trinidad |
| Halliburton West Africa Limited | 99.88889 | United States |
| Halliburton West Africa Limited | 99.88889 | Cayman Islands |
| HGS Enterprises, Inc | 81.82185 | Panama |
| HGS India Limited | 9.71251 | India |
| HLS do Brasil Servicos de Perfilagem Ltda | 0.00069 | Brazil |
| IMCO Services (UK) Limited | 82.00000 | England |
| M-I Drilling Fluids Canada Inc | 36.00036 | Canada |
| M-I Drilling Fluids Company | 36.00000 | United States |
| Mashhor Well Services Sdn Bhd | 70.00000 | Brunei |

## LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY – Continued

| Entity Name | Ownership <100% | Country of Incorporation |
|---|---|---|
| MIHC, Inc | 10.00000 | United States |
| Nigeria Surveys Limited | 98.00000 | Nigeria |
| Otis Engineering Italiana, SRL | 99.44444 | Italy |
| Productos Industriales de Veracrus, SA de CV | 49.00000 | Mexico |
| PT Halliburton Drilling Systems Indonesia | 80.00000 | Indonesia |
| PT IMCO Services, Indonesia | 65.00000 | Indonesia |
| PT Udemco Otis Indonesia | 80.00000 | Indonesia |
| Quimicas do Brasil Limitada | 99.99973 | Brazil |
| Reservoir Monitoring, Inc | 50.00000 | United States |
| Tianjin Orient Halliburton Geophysical Service Company Ltd | 5.10000 | China |
| Tri-Can Perforators Ltd | 77.01530 | Trinidad |

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No. 94-594

In The

# Supreme Court of the United States

October Term, 1994

KEN NASH,

*Petitioner,*

v.

HALLIBURTON COMPANY AND COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

*Respondents.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## RESPONDENT HALLIBURTON COMPANY'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Halliburton Company respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

## OPINIONS AND JUDGMENTS IN COURTS BELOW

Following are citations to the opinions and judgments in this case rendered in the courts below:

*Halliburton Company v. Commissioner*, 100 T.C. 216 (1993).

*Halliburton Company, by Ken Nash, Employee v. Commissioner*, 100 T.C. 216 (1993).

*Halliburton Company, by Ken Nash, Employee v. Commissioner*, 25 F.3d 1043 [1994 U.S. App. LEXIS 15075 (Doc. No. 93-4978)] (5th Cir. 1994).

*Halliburton Company v. Commissioner*, 25 F.3d 1043 [1994 U.S. App. LEXIS 15076 (Doc. No. 93-4996)] (5th Cir. 1994).

## STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATEMENT OF THE CASE

Since 1944 Halliburton Company ("Halliburton") has maintained the Halliburton Profit Sharing and Savings Plan ("Plan" or "Halliburton Plan") for the benefit of its employees. The Halliburton Plan is a "qualified" defined contribution retirement plan meeting the requirements of section 401(a) of the Internal Revenue Code of 1986, as amended, ("Code") and is entitled thereby to certain tax-favored treatment. I.R.C. §§ 401(a), 402(a), 404(a), 501(a). The Plan provides, as required, that upon its "partial

termination" the rights of all affected employees to benefits accrued to the date of that partial termination are fully vested and nonforfeitable. I.R.C. § 411(d)(3).

Whether a partial termination has occurred in order to trigger full vesting of the affected participants is determined with regard to all the facts and circumstances of a particular case. Treas. Reg. § 1.411(d)-2(b)(1). One of these facts and circumstances includes the exclusion from plan participation, by reason of employment severance, of a group of employees previously covered by the plan. *Id.*

As a result of a severe downturn in the petroleum industry, Halliburton had a reduction in its workforce during 1986. In light of this workforce reduction, in April 1987 Halliburton filed with the Dallas District Director of the Internal Revenue Service (sometimes referred to herein as "Service") an application for a determination that, under the facts and circumstances surrounding the workforce reduction, a partial termination of the Halliburton Plan did not occur in 1986. After considering Halliburton's application for seventeen months, on September 7, 1988, the District Director proposed to issue a determination letter concluding that a partial termination of the Halliburton Plan had occurred. However, after two additional years of administrative consideration, the Service still had not made a final determination on the partial termination issue. During the entire administrative process, Halliburton complied with all requests by the Commissioner for additional information relating to the partial termination inquiry.

Having received no final administrative determination, on November 21, 1990 (more than three and one-half

years after its initial request for a determination) Halliburton filed suit in the Tax Court under Code section 7476(a)(2).[3] Halliburton requested a declaratory judgment that no partial termination of the Halliburton Plan had occurred in 1986 and that the Plan remained qualified under Code section 401(a). Two months later, Mr. Nash, a former Halliburton employee terminated in 1986, also filed a Tax Court petition, requesting a declaratory judgment that the Halliburton Plan had been partially terminated in 1986. As a Halliburton Plan participant, Mr. Nash was an "interested party" with standing to file such an action. *See* Treas. Reg. § 1.7476-1(b). The Tax Court consolidated the two cases for briefing and opinion.

Pursuant to Tax Court Rule 217(a), these actions were decided solely on the basis of the administrative record, which was voluminous. The parties stipulated in the Tax Court that the exhibits contained in the administrative record constituted the entire record and are genuine.

On March 24, 1993, the Tax Court ruled that a partial termination of the Halliburton Plan had not occurred. Both the Commissioner and Mr. Nash appealed this decision to the Fifth Circuit Court of Appeals, which consolidated the appeals for briefing and opinion.

On May 31, 1994, the Fifth Circuit affirmed the Tax Court decision by per curiam opinion. Mr. Nash has filed a petition for writ of certiorari requesting that the Fifth Circuit opinion be reviewed. The Commissioner did not

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[3] Contrary to Mr. Nash's statement in his petition, the Service never issued a final determination that a partial termination of the Halliburton Plan had occurred.

seek rehearing in the Fifth Circuit and has not petitioned this Court for writ of certiorari.

## SUMMARY OF ARGUMENT

This Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not require that deference be given either (i) to the position of the District Director or the Appeals Officer of the Internal Revenue Service, taken during the administrative consideration of Halliburton's determination request, or (ii) to the position of the Commissioner of Internal Revenue fashioned as a litigating party in the Tax Court and the Fifth Circuit. In neither capacity was the Service promulgating a statutory interpretation "by the agency." Furthermore, the Service's statutory construction was not made in a rulemaking capacity. It was neither a legislative regulation entitled to *Chevron* deference, nor an interpretive regulation or ruling entitled to some lesser degree of deference. The Service's position in this case was expressed solely as a party involved in a fact specific controversy with a taxpayer.

The Fifth Circuit's decision below is not in conflict with the Second Circuit's decision in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). In *Weil*, the Second Circuit did not defer to the position of the Service as a litigating party. Furthermore, there is no suggestion in *Weil* that the Second Circuit would defer to the Service's position where that position is merely a litigating position as in this case. In fact, in post-*Chevron* cases, the Second Circuit has refused

to defer to an agency's litigation posture regarding statutory application or interpretation. Thus there is no circuit split created by the Fifth Circuit's decision in this case.

Finally, there is no overriding issue of public importance that need be addressed in this case. The determinations below were fact specific and involved no erroneous application of law. Granting certiorari would not serve any public weal or provide any needed resolution of an important federal question.

## REASONS FOR DENYING THE WRIT

### I. THE FIFTH CIRCUIT AND THE TAX COURT OPINIONS IN THIS CASE DO NOT VIOLATE THE PRINCIPLES OF THIS COURT'S OPINION IN *CHEVRON*

Mr. Nash argues that certiorari should be granted because the Tax Court and the Fifth Circuit failed to give deference to a statutory interpretation of Code section 411(d)(3) by the Internal Revenue Service under the principles enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Mr. Nash apparently claims that *Chevron* deference is so broad as to extend to the Service's position as an advocate that, under the facts and circumstances in the record, a partial termination of the Halliburton Plan occurred in 1986. It is true that the Tax Court reached the opposite conclusion based upon all the facts and circumstances. It is also true that the Commissioner, as a party litigant, made arguments as to the significance of certain factual circumstances, which the Tax Court found unpersuasive.

None of those arguments, however, was due *Chevron* deference. Simply put, neither the Tax Court ruling, nor the Fifth Circuit affirmance of that ruling, runs afoul of *Chevron*, properly applied.

*Chevron* involved a direct appeal from an administrative promulgation of a legislative regulation, pursuant to an express Congressional grant of authority. *Chevron*, 467 U.S. 840-41, 859. In that context, this Court held that, if a statute is silent or ambiguous with respect to a specific issue, the agency's interpretation of the statute should be given deference if it is a permissible construction. *Chevron*, 467 U.S. at 842-843, 865. The agency's position is entitled to deference under *Chevron* only where the statute is silent or ambiguous with respect to the issue and the agency's construction is promulgated in its "rulemaking capacity." *See Stinson v. United States*, 113 S.Ct. 1913, 1918 (1993). Even assuming Code section 411(d)(3) is silent or ambiguous with respect to the issues involved in this case, the other elements justifying *Chevron* deference are not present.

**The Service's Position in This Case Did Not Constitute a Statutory Interpretation Made "By the Agency"**

The Service's views expressed in this case regarding application of Code section 411(d)(3) did not constitute a construction "by the agency" authorized to administer the statute. The agency positions regarding statutory construction and application were made (i) by the District Director and the Appeals Officer in the process of examining a determination request by Halliburton and (ii) by the Commissioner as a party to litigation in the courts

below. This context is far afield from the formal delegated rulemaking procedure involved in *Chevron*.

A construction by a District Director cannot be deemed an interpretation "by the agency" authorized to administer the relevant statute. In the Department of the Treasury, the official immediately in charge of the Internal Revenue Service is the Commissioner of Internal Revenue. The Commissioner is assisted in administration of the internal revenue laws by Assistant Commissioners, Regional Commissioners, and District Directors. There are fifty-eight Internal Revenue Districts. The District Director's office is the one with which the taxpayer has contact. All functions related to the assessment and collection of taxes are vested in the District Director's offices. However, neither District Directors nor Appeals Officers (to whom a taxpayer may appeal a proposed adverse determination by a District Director) are vested with rulemaking authority on behalf of the Treasury. *See* Treas. Reg. §§ 601.105, 601.106, 601.601.

Furthermore, a position regarding the proper application of a statute taken by the Commissioner during or for the purposes of litigation does not qualify as an interpretation "by the agency." It is merely the biased contention of one of the parties to the litigation. Accordingly, such an interpretation is not made by the agency and is due no deference. *See, e.g., Higgins v. Commissioner*, 312 U.S. 212, 215 (1941); *Stubbs v. Overbeck & Associates, Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971); *Crow v. Commissioner*, 85 T.C. 376, 389 (1985).

Therefore, neither the District Director's and the Appeals Officer's application of Code section 411(d)(3) in

the proposed adverse determination, nor the position advanced by the Commissioner in her Tax Court and Fifth Circuit briefs, constitutes a statutory construction "by the Treasury," i.e., the agency charged with administering the relevant statute.

**The Service's Position in This Case Was Not Articulated in its Rulemaking Capacity**

Even were the positions of the Service regarding the application of Code section 411(d)(3) in this case deemed to be the official position of the agency, *Chevron* deference is due to a governmental agency's interpretation only when such interpretation is the "product of delegated authority for rulemaking." *See Stinson*, 113 S.Ct. at 1918. Statutory interpretations of the Internal Revenue Code in the form of Treasury regulations are given *Chevron* deference if they are "legislative regulations," i.e., issued by the Treasury under a specific Congressional grant of authority. *E.g., McKnight v. Commissioner*, 7 F.3d 447, 450 (5th Cir. 1993); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994); *Nalle v. Commissioner*, 997 F.2d 1134, 1138 (5th Cir. 1993); *Dresser Indus., Inc. v. Commissioner*, 911 F.2d 1128, 1137-38 (5th Cir. 1990).

Post-*Chevron* cases have applied a lesser degree of deference to "interpretive regulations," i.e., regulations adopted by the Treasury pursuant to its general authority to issue rules and regulations under Code section 7805(a). *E.g., Brown v. United States*, 890 F.2d 1329, 1338-39 (5th Cir. 1989); *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 800 (11th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986);

*Anchor Hocking Corp. v. United States*, 11 Cl. Ct. 173, 175 (1986). *Chevron*, however, was not the basis for that deference. *Chevron* has been broadened by a few courts to give a limited degree of deference to revenue rulings and other non-legislative interpretations by the Service. *E.g., Johnson City Medical Center v. United States*, 999 F.2d 973, 976 (6th Cir. 1993); *Weil v. Retirement Plan Admin. Comm. of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). *But see, e.g., Davis v. United States*, 495 U.S. 472 (1990) (wherein this Court accepted the Commissioner's interpretation of a statute, but without citing *Chevron*, thereby suggesting that *Chevron* deference is not so broad as to cover an interpretive regulation or ruling by the Service); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993) (*Chevron* deference is not given to interpretive regulations, and the respect to be given interpretive regulations depends upon their persuasiveness); *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983) (revenue rulings issued by the Service are entitled to no deference); *Gordon v. Commissioner*, 88 T.C. 630, 635 (1987) (same).

When the District Director and the Appeals Officer issued a proposed adverse determination and the Commissioner advanced a litigating position in this case, they were not acting under a specific Congressional grant of rulemaking authority as was present in *Chevron*. Neither was the supposed "statutory construction" by the District Director, Appeals Officer, or Commissioner enunciated in an interpretive regulation or ruling under the general grant of authority of Code section 7805(a). Indeed, the Commissioner's positions were advanced only in her role as a party to this specific controversy. This Court has stated that "[d]eference to what appears to be nothing

more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (referring in part to deference to an agency position as enunciated in *Chevron*).

Review of the Service's case-specific action is statutorily vested in the United States Tax Court, the United States District Courts, the United States Courts of Appeal, the United States Claims Court, and the United States Supreme Court, in accordance with the respective jurisdictions of these bodies. I.R.C. §§ 6213, 7422, 7476; 28 U.S.C. §§ 1254, 1346(a)(1). Deference to the Service's position taken while auditing or examining a taxpayer or during subsequent litigation effectively would deny the taxpayer the right to appeal an adverse administrative decision. *Cf. Williams Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (stating that the mere litigating position of the Director of Office of Workers' Compensation Programs, United States Department of Labor, is not entitled to deference as claimants would be effectively denied the right to appellate review). The reading of *Chevron* advocated by Mr. Nash would render meaningless the statutorily vested review of the Service's actions.

Neither the Tax Court nor the Fifth Circuit in this case violated the principles of *Chevron*. The position of the Service that Mr. Nash alleges should be given deference was not enunciated by an arm of the agency authorized to promulgate a statutory construction on behalf of the Treasury; nor was the position taken pursuant to any delegated rulemaking authority. Thus there is no basis for granting Mr. Nash's petition for writ of certiorari on this ground.

## II. THE FIFTH CIRCUIT'S HOLDING IN THIS CASE DOES NOT CREATE A CIRCUIT SPLIT WITH THE SECOND CIRCUIT REGARDING THE APPLICATION OF *CHEVRON*

Contrary to Mr. Nash's position, the Fifth Circuit's refusal to adopt the Service's case specific application of Code section 411(d)(3) does not conflict with the Second Circuit's application of *Chevron* in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). The Second Circuit in *Weil* did not defer to (or even give any greater weight to) the position of the Service as a party to a controversy with a taxpayer. The *Weil* court did defer to the Service's interpretation of Code section 411(d)(3). However, the Commissioner was not a party in *Weil*, and her statutory construction was not advanced either during the administrative examination of a taxpayer or as a litigating party. Rather, the Service's position was taken as an *amicus* in response to a specific request by the Second Circuit to help the Court resolve a controversy between two private parties. *Weil*, 933 F.2d at 108. In fact, the Second Circuit has expressly stated in a post-*Weil* opinion that an agency's "litigation posture is entitled to no deference." *Lewis v. Grinker*, 965 F.2d 1206, 1220 (2d Cir. 1992). *See also Skandalis v. Rowe*, 14 F.3d 173, 179 (2d Cir. 1994) (where the Second Circuit granted deference to an agency's *amicus* position and noted that the agency "is not a party to this action").

Moreover, there is no suggestion in *Weil* that the Second Circuit would have applied *Chevron* so as to require a reversal of the Tax Court in this case. Indeed, in its recent decision in *Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291 (2d Cir. 1994), which involved a

controversy between the Service and a taxpayer, the Second Circuit considered the various interpretive positions taken by the Commissioner and the taxpayer and ultimately concluded that the Tax Court committed no error in finding against the Commissioner's administrative and litigating positions. *Wachtell*, 26 F.3d at 297. In so holding, the Court made no mention of *Chevron* and appropriately gave the Commissioner's positions no greater weight than those of the taxpayer.

The decision in this case neither creates nor suggests a circuit split between the Fifth and Second Circuits with respect to the proper application of *Chevron*. Thus there is no split to be addressed by a review of this case.

## III. THIS CASE DOES NOT INVOLVE A QUESTION OF IMPORT TO THE GENERAL PUBLIC THAT SHOULD BE ADDRESSED BY THIS COURT

Finally, Mr. Nash contends that certiorari should be granted because the underlying issue of partial termination "affects large numbers of persons throughout the United States." Mr. Nash's implication is that this case involves an erroneous ruling on an important question of federal law that must be corrected by this Court.

Contrary to this implication, the decision of the Tax Court was solidly grounded on sound authority in the partial termination case law. In reaching its determination, the Tax Court properly and exhaustively dealt with the factual record and reached a fact-specific conclusion. It did not propose to create new law, nor did it disapprove of or refuse to follow any controlling precedent.

In affirming the Tax Court, the Fifth Circuit articulated no legal principles. Rather, it simply affirmed that the Tax Court had applied appropriate legal standards to the facts present in the administrative record. This affirmance did not generate erroneous or misleading legal precedent that need be corrected by this Court.

Mr. Nash's true complaint is that the courts below did not believe that the facts and circumstances supported a finding of a partial termination. The rulings made below were fact-specific as to the Halliburton Plan. There is nothing about the result or the reasoning of either opinion that justifies review by this Court.

## CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari seeking a review of the Fifth Circuit decisions in *Halliburton Company v. Commissioner* and *Halliburton Company, by Ken Nash v. Commissioner* should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on October 24, 1994, true and correct copies of Respondent Halliburton Company's Brief in Opposition to Petition For Writ of Certiorari were sent by United States postal service, certified mail, return receipt requested, to:

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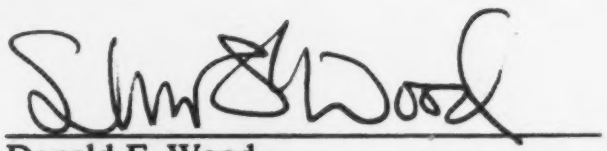

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